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Vol. 3081

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

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Appellee.

APPELLANTS' BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

JURISDICTIONAL STATEMENT

Jurisdiction of the court below was predicated on Title 18, USCA, Sec. 3231, and jurisdiction of this court is based upon Title 28, USCA, Sec. 1291. The federal indictment is found in the Transcript of Record, Volume I, No. 3, pages 10 to 21.

On February 4, 1957, an indictment was filed in the United States District Court for the District of Oregon (Tr. of Record No. III, pages 10 to 21) charging appellant's with violations of Section 371, Title 18, USC

(Conspiracy) in the first count, and violations of Sections 501 and 605, Title 47, USC (the wiretapping statutes), in the other eight counts.

A motion to dismiss and a motion to suppress were filed, argued, and testimony taken on the motion to suppress, and on April 12, 1957, the motion to dismiss was denied about 5:00 p.m. (M.S. 531).

On April 13th a civil injunction suit was filed by these defendants against the State officers participating in the State raid to enjoin them from testifying concerning the raid under the analogy of *Rea v. U. S.*, 350 U.S. 314. After hearing on the order to show cause, a temporary restraining order was issued by the State court so restraining them (Transcript of Proceedings, Volume I, pages 3 to 5). The trial below commenced on April 16th and the Court ordered the witnesses so restrained to testify under penalty of contempt of the Federal court and each of the State officers so ordered then gave testimony.

At the conclusion of the Government's case and upon motion of the appellants the trial court dismissed Counts III and IV of the indictment and overt acts numbered 1 and 2 of the indictment (Minute entry Tr. of Record, Vol. 1, No. 27, p. 105; see also, Tr. of Proceedings, Vol. XV, p. 2468). The appellants were each found guilty upon the seven counts submitted to the jury and appealed to this Court from the judgments and supplemental judgments of fines and imprisonment and costs assessed against each (Tr. of Record, Nos. 34, 35, 39 and 40, pp. 127 to 130, 140 and 141).

PRELIMINARY STATEMENT

Since the testimony of the Government's case in chief is found in 15 volumes extending over approximately 2,500 pages¹ and, in addition, there is one volume of the proceedings on defendants' motion for a continuance,² two volumes of over 500 pages of the proceedings and testimony upon defendants' motion to dismiss and motion to suppress the evidence,³ and 240 pages of the transcript of record,⁴ it is difficult to know when and where to present the "concise statement" of pertinent facts as required by the rules, in a manner best calculated to bring about clarity in presentation.

In order to facilitate clarity in this brief, we have prepared concise statements of pertinent facts under the various specifications of errors, particularly under the specification of error relating to the motion to suppress, at the outset of the specification of errors at the trial, and have included a brief narrative digest of all of the testimony taken on both the motion to suppress and the Government's case in chief at the trial in the Appendix with page references. (Preparation of such a digest necessarily involves some editorial judgment but we have attempted to include all inferences favorable to the Government's theory).

¹ Which will hereinafter be cited as Transcript, or (Tr.).

² Which will hereinafter be cited as Continuance Transcript, or (C Tr.).

³ Which will hereinafter be cited as Motion to Suppress, or (M.S.).

⁴ Which will hereinafter be cited as Transcript of Record, or (Rec.).

We will first briefly review

THE STATE COURT PROCEEDINGS

About 5:30 p.m., May 17, 1955, a State of Oregon search warrant was issued by a Judge of the State District Court on the affidavit of the District Attorney for Multnomah County. That night the home of appellant Clark was broken into and searched pursuant to said search warrant and it is claimed that, among other things, five reels of electronic tape recordings were seized by the deputy sheriffs. On the 21st of May, 1955, a motion to suppress was filed and testimony taken with the matter being continued and further testimony being taken on the 22nd and the 23rd of May. On the 22nd of May, 1955, while the hearing on the motion was in progress, a state grand jury indicted the defendants on a charge of violating the state wiretapping statute. The State District Judge who issued the warrant, after hearing on the motion to suppress, allowed the motion, declared the search a nullity, but instead of ordering the tapes returned to defendant Clark, ordered them turned over to the Attorney General of the State of Oregon for use in the Attorney General's vice investigation. The Circuit Court of the State of Oregon heard a similar motion and after argument, and while under advisement by the Circuit Court of the State of Oregon, and on September 5, 1956, a federal search warrant was issued by the United States Commissioner for the District of Oregon based on an affidavit of an FBI agent and five reels of tape were seized by the Federal Government under said search warrant.

We believe that clarity will be served by this arrangement of material and hence we will now proceed with the specifications of error, commencing with the specification relating to the motion to dismiss the indictment. For the convenience of the Court, we note that the other statements of the pertinent facts are to be found at pages 30 to 51, and 83 to 93 of this brief.

SPECIFICATION OF ERROR NO. 1

The Court erred in denying defendants' motion to dismiss (or in the alternative) a motion to require the government to furnish a bill of particulars in certain instances.

SUMMARY OF INDICTMENT

First Count (Conspiracy) charges the Appellants conspired (Title 18, § 371 U.S.C.) in violation of Title 47, §§ 501 and 605 (the wiretap statute) to "intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications . . ." The First Count alleged that it was further a part of the conspiracy:

a) That Defendants would have a recording device installed in a certain apartment, which recording device would be "connected to lines intercepting the telephone wires" of one Maloney in the adjoining apartment;

b) That defendant Elkins would employ defendant Clark to intercept the telephone conversations of Ma-

loney and others, and between others, carried on Maloney's telephone line, and record the same, without authority of the persons conversing over said telephone;

c) That said recordings would be "delivered to and possessed by defendants";

d) That defendants would play back the recordings, and defendant Elkins would divulge the existence, and contents of said intercepted conversations to "other persons";

The Conspiracy count alleged eight overt acts, the first two of which were withdrawn by the lower Court. The remaining six alleged that:

a) Defendant Elkins directed one Kane to rent an apartment and deliver the keys to defendant Elkins;

b) Defendants placed a recording device in said apartment;

c) Defendant Elkins went to the home of one William Langley and divulged to Langley the existence of said intercepted conversations and showed to Langley a written transcript of some of said intercepted conversations;

d) Defendant Elkins took to home of Janice Langley (wife of William) a recording machine and played it in her presence;

e) Defendant Elkins took a recording machine to the home of one Crosby and divulged the existence and published the contents of said intercepted communications to Crosby by playing recordings in Crosby's presence;

f) Defendant Clark possessed at his residence recording equipment, spools of tape and wire, for use thereon, and concealed tapes upon which were recorded said intercepted communications, said defendant Clark knowing that said tapes contained recordings of intercepted communications.

The indictment included also eight counts (II through IX) of alleged substantive violations of the wiretap statute (Sections 501 and 605 of Title 47, U.S.C.A.). Counts III and IV were withdrawn by the Court, leaving only six substantive counts. We feel that a summary in tabular form will adequately describe these counts, as follows:

COUNT NUMBER II

Description of alleged interception	Elkins and Clark "did knowingly, wilfully and unlawfully, . . . without authority of the senders, intercept . . .
Persons whose conversations were allegedly intercepted	"Wire communications between Langley and Maloney . . ."
Alleged divulger, publisher or user	"and divulge or cause to be divulged the existence of such . . ."
Persons to whom divulgence allegedly made	" . . . to Langley, Crosby and others . . ."

COUNT NUMBER V

Description of alleged interception	" . . . not being authorized by the senders . . ."
	Elkins and Clark "did knowingly, wilfully and unlawfully intercept . . ."

Persons whose conversations were allegedly intercepted

Alleged divulger, publisher or user

Persons to whom divulgence allegedly made

"wire communications between Maloney and Sheridan"

and Elkins "did thereafter divulge and caused to be divulged the existence," contents, etc."

" . . . to Langley and Crosby and to others . . ."

" . . . and did use the same for the benefit of Elkins and others not entitled thereto."

COUNT NUMBER VI

Description of alleged interception

Persons whose conversations were allegedly intercepted

Alleged divulger, publisher or user

Persons to whom divulgence allegedly made

Elkins and Clark did "knowingly, wilfully and unlawfully intercept, . . . not being authorized by the senders . . ."

"A wire communication between Maloney and Langley . . ."

and Elkins, "having become acquainted with the contents, etc. thereof and knowing [the same to be] so obtained did thereafter unlawfully divulge and publish the existence, contents," etc.

" . . . to Mrs. Janice Langley and others"

" . . . and use the same for the benefit of Elkins and other persons not entitled thereto."

COUNT NUMBER VII

Description of alleged interception	Elkins and Clark, "did, not being authorized by the sender, knowingly, wilfully and unlawfully intercept . . ."
Persons whose conversations were allegedly intercepted	"A wire communication between Maloney and Langley"
Alleged divulger, publisher or user	and Elkins, "did thereafter, having become acquainted with the contents, etc. thereof, and knowing that such information was so obtained, divulge and publish the existence, contents, etc."
Persons to whom divulgence allegedly made	" . . . to Langley and others . . ." "And did use the same for his own benefit and for the benefit of another not entitled thereto . . ."

COUNT NUMBER VIII

Description of alleged interception	Elkins and Clark, "did, without the consent of the senders, knowingly, wilfully and unlawfully intercept . . ."
Persons whose conversations were allegedly intercepted	"A wire communication between Maloney, Portland and McLaughlin in Seattle."
Alleged divulger, publisher or user	and Elkins, having become acquainted with the contents, etc., of the same, did divulge and publish the existence, contents, etc."

Persons to whom divulgence allegedly made

" . . . to Langley, knowing that such information was so obtained . . ."

"and did use the same for his own benefit or for the benefit of another not entitled thereto . . ."

COUNT NUMBER IX

Description of alleged interception

Elkins and Clark, "did, knowingly, wilfully and unlawfully, without being authorized by the senders, intercept . . ."

Persons whose conversations were allegedly intercepted

" . . . a wire communication between Langley and Anderson . . ."

Alleged divulger, publisher or user

" . . . and did divulge and publish . . . the existence, contents, etc. of such intercepted communication . . ."

Persons to whom divulgence allegedly made

" . . . to Langley, and Crosby and others . . ."

We feel that it will be helpful to quote the wiretap statute, Title 47, § 605, U.S.C.A., emphasizing clauses 2 and 4, the relevant sections here, for purposes of contrast:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agents, or attorney, or to a person employed or authorized to forward such communication to its

destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by court of competent jurisdiction, or on demand of other lawful authority; *and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereof; *and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . ."*

It will be seen therefore that the two relevant clauses of the section, clause 2 and clause 4 have the following effect:

Clause 2 makes it unlawful for one

- a) to intercept *AND*
- b) to divulge or publish.

Clause 4 makes it unlawful for one

- a) who has received an intercepted communication (or who has become acquainted therewith), with knowledge of the interception

b) to divulge or publish, *OR*

c) to use the same for his or another's benefit.

Clauses 1 and 3, on the other hand, have nothing to do with interception, but rather with unauthorized divulgence or use by the receiver, or transmitter. This is an important distinction.

It is also important that clause 2, being phrased in the conjunctive, requires *two acts*—interception *AND* divulgence; clause 4 requires *two conditions*—reception or acquaintance with an intercepted communication, combined with divulgence or use.

Under clause 2, therefore, interception alone, or divulgence alone, is not a crime; both elements are necessary, plus, of course, the vital elements of wilfulness and knowledge (Sec. 501, Title 47).

Similarly, under clause 4, mere divulgence or use is not a crime. Such divulgence or use (in addition to being wilful and with knowledge) must be by one who receives or becomes acquainted with a communication intercepted in violation of clause 2, and who knows that it was so obtained. Likewise, mere reception or becoming acquainted, even knowing that it was an intercepted communication, is not enough under clause 4; a divulgence or use also is required to make out a crime. And this indictment, and the validity of the trial court's rulings on the motions to dismiss, must be considered in the light of the foregoing distinctions.

A. Objections of Clark as to Counts V, VI, VII and VIII.

The first point to be mentioned here, on behalf of defendant Clark alone, is that clearly Counts V to VIII, inclusive, allege an interception by both defendants Elkins and Clark, but each count alleges a subsequent divulgence or use by *defendant Elkins* alone.

As we have seen before, to constitute a crime, clause 2 clearly requires two acts done wilfully and knowingly: interception *and* divulgence. Similarly, clause 4 clearly requires a wilful and knowing receipt of or acquaintance-ship with intercepted communications *and* a divulgence or use thereof.

Nowhere, in counts V, VI, VII and VIII, is there any allegation that defendant Clark did more than intercept. It would hardly seem to require any extended discussion that these counts were and are faulty as to Clark. Even if the proof should show that Clark was an aider and abettor of Elkins, as to the divulgence or use claimed by the indictment (which defendants of course do not admit), such could not cure the fatal defect in the allegations.

It would be a novel and unwarranted principle of law that a man may be convicted for a full crime when he is charged with only a half crime, under a statute prescribing the *two* essential elements of the crime.

When this objection was raised at the time Clark excepted to the Court's instructions, the court said:

"I understand your position on it. I think there is a real serious question there." (Tr. 2530).

Nor can it be said that the Government did not know how to draw an indictment. Counts II and IX, for example, though otherwise defective, are not subject to the objection here made.

It is submitted, therefore, that the court clearly erred in not dismissing Counts V, VI, VII and VIII as to Clark, for reasons just given.

B. Objections to Counts II through IX, inclusive.

Defendant and each of them, timely moved that Counts II through IX, inclusive, be dismissed because they failed to comply with Rule 7(c) of the Federal Rules of Criminal Procedure in that each of the counts failed to set forth a "plain, concise and written statement of the essential facts constituting the offense charged" because none of these counts contained *any allegation whatsoever* as to the date or dates upon which the alleged divulgence or use of the allegedly intercepted wire communication took place. As we have seen before, this is a peculiar statute in that it requires two elements (interception plus divulgence) under clause 2 and two things (divulgence or use by one who receives or becomes acquainted) under clause 4. Since both elements are necessary and vital elements of the crime (and since wilfulness and knowledge are also strict requirements), these matters should be stated plainly, concisely and definitely, if Rule 7(c) F. R. Cr. P. is to mean anything. It will be noted that in each of counts 2 through 9, the government very carefully alleged the date of the alleged interception (five of the eight original substantive counts alleging a specific day of the month). But in none

of those counts, did the government allege a date of divulgence or use.

The purposes of an indictment are two-fold. First, the indictment serves to give fair notice to the accused of the essential facts of the offense charged with sufficient clarity to enable him to prepare his defense. Secondly, clarity and conciseness must exist in an indictment to enable the accused to plead a judgment, whether of acquittal or conviction, as a bar to a further prosecution. *Ornelas v. U. S.* (9th Cir. 1956), 236 F.2d 392; see *Mitchell v. U. S.* (10th Cir. 1944), 143 F.2d 953; *Roberson v. U.S.* (5th Cir. 1956), 237 F.2d 536; and *Sutton v. U. S.* (5th Cir. 1946), 157 F.2d 661.

As Judge Yankwich said in *U. S. v. Young*, 113 F. Supp. 20 (affirmed 212 F.2d 236, certiorari denied, 347 U.S. 1015), “. . . facts must be stated and not conclusions of law alone, because a crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time and place and circumstances.”

The defendants were thus deprived of fair notice of the essential facts, by failure of Counts II through IX to specify the date of alleged divulgence or use with the reasonable particularity required by Rule 7(c), and by essential notions of fairness. The lower court not only denied their motion to dismiss on this ground, it also denied their alternate motion for a bill of particulars as to these dates. We thus claim error in these rulings.

Furthermore, the crime being composed of the two acts, interception and divulgence, it would be absolutely impossible for these defendants later to plead judgment of conviction if it be sustained, or judgment of acquittal if this Court should reverse and order such a judgment, as a bar to a future prosecution. This is an acute matter in a two-element crime, for it is entirely conceivable that the government might some day charge these defendants with the same alleged interception and a *different* divulgence or use. In such event, there would be no way in which the defendants could plead either conviction or acquittal as a bar to such a prosecution. Thus in a wiretap matter, the government could repeatedly prosecute a man based upon a single alleged interception and repeated alleged divulgences and he would never know when he had been acquitted.

Tested by accepted rules, Counts II through IX of indictment are clearly insufficient either (1) to give fair notice to these defendants of the essential facts of the offense with sufficient clarity to prepare their defense or (2) to enable defendants to plead any judgment of acquittal or conviction as a bar to a future prosecution; we submit that the lower court erred in denying the motion to dismiss Counts II to IX.

Defendants moved, in the alternative, for a bill of particulars requiring the government to particularize the dates of alleged divulgence or alleged use.

The function of a bill of particulars is likewise two-fold. First, it enables the defendant to prepare his defense, and secondly, it protects a defendant against

second prosecution of the same offense. *Norris v. U. S.* (5th Cir. 1946), 152 F.2d 808.

The purpose of a bill of particulars is to secure "facts, not legal theories," *Kempe v. U. S.* (8th Cir. 1945), 151 F.2d 680, and a defendant's request for a bill of particulars should be "liberally interpreted," *U. S. v. O'Connor* (2nd Cir. 1956), 237 F.2d 466.

It is true that a bill of particulars is not to be used as a "fishing expedition" nor merely to try and "get the government's evidence." But it does violence to the English language, and to the notion of due process, to boot, to call the modest request by the defendants—a bill of particulars indicating the dates of alleged divulgence of use—either a "fishing expedition" or an attempt to get the government's evidence. In summarily rejecting this modest request, the court clearly exceeded its discretion.

In ordering a bill of particulars as to, inter alia, time and place, Justice Whitaker, when a District Judge, said, in *U. S. v. Smith*, (W.D., Mo. 1954), 16 F.R.D. 372, that:

"Certainly the fact that an indictment on information conforms to the simple form suggested in the rules is no answer or defense to a motion for a bill of particulars under Rule 7(f). Rules 7(f) necessarily presupposes an indictment or information good against a motion to quash or a demurrer. Its proper office 'is to furnish to the defendant *further information* respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial.' and when necessary for these purposes, it to be granted even though

it requires 'the furnishing of information which in other circumstances would not be required because evidentiary in nature', and an accused is entitled to this 'as of right'. U. S. v. U. S. Gypsum, D.C., 37 F. Supp. 398, 402. To the same effect are Singer v. U. S., 3 Cir., 58 F.2d 74, U.S. v. Allied Chemical & Dye Corp., D.C., 42 F. Supp. 425, 428; Fontana v. U. S., 8 Cir., 262 F. 283. It seems quite clear that 'where charges of an indictment are so general that they do not sufficiently advise defendant of the specific acts with which he is charged, a bill of particulars should be ordered.' Cases cited and U. S. v. Grossman, D.C., 55 F.2d 408; Chew v. U. S., 8 Cir., 9 F.2d 348, 353.

"This must necessarily be true when we realize that there is no discovery means in criminal cases, such as provided by the civil rules for civil cases, and that the only means open to a defendant, in a criminal case, for the securing of the details of the charge against him is that afforded by Rule 7(f) of the Federal Rules of Criminal Procedure. 'Bills of particulars have grown from very small and technical beginnings into most important instruments of justice. * * * While they are not intended to advise a party of his adversary's evidence or theory, they will be required, even if that is the effect, in cases where justice necessitates it.' U.S. v. Balaban, D.C., 26 F. Supp. 491, 499.

"Nor is it any answer to a motion for a bill of particulars for the government to say: 'The defendant knows what he did, and therefore, has all the information necessary.' This argument could be valid only if the defendant be *presumed to be guilty*. for only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charge.' Fontana v. U.S., 8 Cir., 262 F. 283, 286; U.S. v. Allied Chemical Corp., D.C., 42 F. Supp. 425. This conclusion seems to me to be elementary, fundamental and inescapable.

Without definite specification of the time and place of commission of the overt acts complained of, and of the identity of the person or persons dealt with, there may well be difficulty in preparing to meet the general charges of the information, and some danger of surprise."

Particularly where there was no showing that such a bill of particulars would in any way jeopardize the government's case or imperil the government's position, the court's ruling was error.

C. Insufficiency of Counts V, VI, VII and VIII as to Elkins.

Counts V to VIII inclusive, alleged an unlawful use by defendant Elkins for his own benefit or the benefit of others not entitled thereto of the existence, contents, etc., of allegedly intercepted wire communications. Here again, these counts are clearly insufficient under Rule 7(c), F. R. Cr. P., because there is no "plain, concise and definite statement" of the facts constituting the offense by reason of the fact that there is no description whatsoever of the *manner* of alleged "unlawful use." Therefore there was insufficient clarity in these allegations, either to enable the defendant Elkins to prepare his defense, or to enable him later to plead a judgment of acquittal or conviction as a bar to a subsequent prosecution. See the authorities cited immediately above.

Furthermore, an alternate request was made that the government be required to furnish a bill of particulars spelling out the manner of alleged use and benefit. This modest request, similarly neither a fishing expedition nor a move to get the government's evidence, was sum-

marily denied by the lower court despite the absence of any showing by the government that such would endanger the government's case; in this denial the court exceeded its discretion, which calls for reversal.

It should be emphasized that defendant Clark also joins in this argument, although these counts, V through VIII, do not charge him with any "use."

D. Counts V, VI, VII and VIII each charge two crimes.

In each of Counts V through VIII, the government attempted a shotgun marriage of a clause 2 crime and a clause 4 crime, thus rendering each count faulty in stating two crimes, or else in containing prejudicial matter. (The "withdrawn" counts, III and IV also suffered from this infirmity.)

It will be recalled that a clause 2 crime consists of a wilful and knowing interception plus divulgence of a communication; clause 4, on the other hand, requires wilful and knowing divulgence or use, *not by the interceptor* (for interception, per se, has no part in clause 4) but by one who receives, or becomes acquainted with a communication, knowing the same to have been unlawfully intercepted. But a mixture of the two does not constitute a crime under either, yet such amalgam is precisely what the plaintiff charges in Counts V through VIII. Each of these counts charges half of clause 2—interception—and half of clause 4—divulgence and use knowing that the information was "so obtained." Hence, these counts clearly fail to state a completed crime under either clause, and they should not be allowed by this court to stand.

E. Failure of Counts II through IX to allege willfulness and knowledge.

Section 501 of Title 47, U.S.C.A. specifies that:

“Any person who *Wilfully and knowingly* does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who *wilfully and knowingly* omits or fails to do . . . shall . . . be punished etc. . . .” (Emphasis supplied).

To constitute the crime, therefore, a person must *wilfully and knowingly* intercept and must *wilfully and knowingly* divulge, under clause 2. Under clause 4, of course, the divulgence or use by one in the specified class must likewise be wilful and knowing. Mere inadvertent, careless or negligent interception, divulgence or use will not suffice.

Indeed, the trial judge seems to have recognized this when he said, in his opinion denying the motion to dismiss: “Under some circumstances the disclosure of the violation could be harmless, while in others it would be evil.” (Tr. 77).

And again, in denying the supplemental Motion to Dismiss, the lower court said:

“Now, of course, we *know that there can be inadvertent interception of messages*. We have all had the experience of talking long distance on the telephone, an interstate commerce communication, and hear, through some technical defect or switching of the wires, another conversation which is, in due course, interrupted and placed on its own proper channel. That is *an inadvertent interception*. “*Many times there can, likewise, be an inadvertent disclosure of the content of a message inadvertently received*. But, we are not troubled with that.

"These indictments alleged an unlawful intent. And, of course, there must be the evil mind in all of these transactions or no crime has been committed." Emphasis supplied) (M.S. Tr. p. 29).

Counts II through IX, (the substantive counts) while carefully alleging that the interception was done "wilfully, knowingly and unlawfully" completely fail to allege a *wilful or knowing divulgence or use* by the defendants. Hence, they fail to state a crime against defendants. Count II, for example, merely alleges that defendants "did knowingly, wilfully and unlawfully . . . intercept . . . and divulge . . .", while Count IX merely alleges that defendant "did knowingly, wilfully and unlawfully . . . intercept . . . and did divulge . . ."

Counts V through VIII, allege (with minor variations) that defendants "did knowingly, wilfully and unlawfully intercept . . . and defendant Elkins did thereafter . . . divulge . . . and use . . ."

Clearly, the substantive counts fail to allege a *wilful and knowing* divulgence or use. Since wilfulness and knowledge are required, in order not to punish an inadvertent divulgence or use, these counts fail.

"When 'wilfulness' is made an essential element of an offense, as it is in this case, it is a general rule that a failure to allege wilfulness is fatal to the indictment. Citing Rule 7(c) and cases". *Marteney v. U. S.* (10 Cir., 1956), 218 F.2d 258.

See also *Screws v. U. S.* (1945), 325 U.S. 91, 89 L. Ed. 1495.

True, it is, as was said by the 4th Circuit in the recent case of *Finn v. U. S.* (May 28, 1958), 256 F.2d

304, that “words of similar import” may cure the otherwise fatal defect of failure to allege wilfulness or knowledge where they are elements of the crime. That was a case dealing with profanity at an airport contrary to airport regulations, and the court held that a person could not conceivably conduct himself “in the manner described—‘without just cause or excuse and in a riotous or disorderly manner, use loud and profane language’—otherwise than knowingly and wilfully.”

Here, however, divulgence or use could be entirely inadvertent, and there are no descriptive words in the counts which would aid the bare charge of “divulgence” or “use.” The language of the indictment descriptive of or relating to divulgence is devoid of “such words of similar import” as would supply the fatal omission of wilfulness and knowledge. Hence, these counts must fall for this fatal defect. See also *Pullen v. U. S.*, 5 Cir. 1957, 164 F.2d 756.

F. Sec. 605 is unconstitutional.

Section 605 of Title 47 is unconstitutional because it attempts to create a penal offense without having made the same sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties and because it forbids the doing of acts in terms so vague that men of common intelligence would, of necessity, have to guess as to its meaning and would differ as to its application. It is, therefore, in violation of the due process clause of the Constitution.

In *Lanzetta v. New Jersey* (1939), 306 U.S. 451, 83 L. Ed. 888, the Supreme Court stated:

"If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Citing cases. *It is the statute, not the accusation under it, that prescribes the rule governing conduct and warns against transgression.* Citing cases. *No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.* All are entitled to be informed as to what the state commands or forbids. The applicable rule is stated in *Connally v. General Construction Company*, 269 U.S. 385, 70 L. Ed. 322: 'That the terms of a penal statute create in a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, constant alike with ordinary notions of fair play and the settled rules of law. And the statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess it its meaning and differ as to its application violates the first essential of due process of law.'

" * * * the terms it (the statute) employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause . . ." (Emphasis supplied).

See also, *U. S. v. Cohen Grocery Company* (1921), 255 U.S. 81, 65 L. Ed. 516, and the annotation at 96 L. Ed. 374.

As noted above, the statute contains four clauses; clauses 1 and 3 relate to "interstate or foreign communication by wire or radio." Both clauses 1 and 3 make criminal certain conduct by those who are receivers or

transmitters of "any interstate or foreign communication by wire or radio."

Since Section 153 of Title 47 defines the terms "wire communication," "radio communication," and "interstate communications," it seems clear that Congress specifically limited the operation of clauses 1 and 3 to communications in interstate commerce, and to communications by wire or radio.

Clauses 2 and 4, however, confront us with an entirely different situation. Clause 2 is not limited to "any interstate or foreign communication by wire or radio"; clause 2 purports to apply to "any communication." And clause 4 is of similar breadth, since it relates to "any communication" specified in clause 2. Clauses 2 and 4, therefore, not being delimited by the term "interstate and foreign communications by wire or radio," and purporting to affect "any communication," are so broad and so vague that men of common intelligence must necessarily guess at their meaning.

It will not do to say that we may read into clauses 2 and 4 the phrase "by wire or radio" or the phrase "interstate or foreign communication," because this construction is clearly forbidden by the Supreme Court's language. The term "any communication" means just what it says, "*any communication, regardless of the means of transmission whether by wire, radio, interoffice communication, human voice or any other means by which one person can communicate a message to another.*"

In the first Nardone case, *Nardone v. U. S.* (1937),

302 U.S. 379, 82 L. Ed. 314, the government introduced communications of defendants obtained by a federal agent who tapped defendants' telephone wires. In seeking to justify, the government contended that even though clause 2 said "no person . . . shall intercept" it did not apply to federal agents; and that although clause 2 forbids divulgence to "any person" it did not apply to "divulgence" in court. Speaking for a seven member majority, Mr. Justice Roberts said:

"*Taken at face value* the phrase 'no person' (in clause 2) comprehends federal agents and the ban on communication to 'any person' bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages (clause 2) with that relating to those known to employees of the carrier, clause 1 and 3. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena" * * *

* * *

"We nevertheless face the fact that the *plain words* of section 605 *forbid anyone*, unless authorized by the sender to intercept a telephone message and direct an equally clear language that 'no person' shall divulge or publish the message to it or its "substance to 'any person'. *To recite the contents* of the message in testimony before a court *is to divulge* the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's argument." (Emphasis supplied).

This decision was subsequently approved by the court in the second Nardone case, *Nardone v. U. S.* (1939), 308 U.S. 338, 84 L. Ed. 307. Similarly, in *Weiss v. U. S.* (1939), 308 U.S. 321, 84 L. Ed. 298, decided the same day, the court used the "face value" rule of construction.

Because Nardone and Weiss were evidence cases rather than cases charging a criminal violation of Section 605, the constitutional infirmities of the broad language of 605 as a penal statute lay hidden, to come to light only in criminal prosecutions such as the case at bar.

Taking the statute at face value, it makes criminal a multitude of ordinary every day human activities, because it forbids interception and divulgence of "*any communication,*" *not merely communications in interstate or foreign commerce. It is only by reading into the statute* something that Congress did not put there, *that it can be saved.*

In order for 605, as a penal statute, to be narrowed to constitutionality and not left so broad and vague as to make "men of common intelligence guess at its meaning" the court is going to have to read into clauses 2 and 4 the words "wire or radio communication" and the words "interstate (or intrastate) communication." However this would require the court to engage in legislation.

This statute, construed at face value, is clearly unconstitutional because it sweeps within its net a great multitude of activities, many of which are clearly harmless. If it be said that Congress intended the necessary words to be read implicitly into clauses 2 and 4, why then were those words put, with precision, into clauses 1 or 3?

The provision in the last part of section 605:

"Provided that this section shall not apply to the receiving, divulging, publishing or utilizing the con-

tents of any radio communication, broadcast or transmitted by amateurs or others for the use of the general public or relating to ships in distress.”

conclusively indicates that Congress, by this exception, intended 605 to apply *to all communications other than the ones expressly exempted from the statute by the provision*. It is a necessary presumption that all that is not clearly embraced in the exception remains within the scope of the principal provision. See Sutherland on Statutory Construction, Section 328 and *Hopkins v. U. S.* (8th Cir. 1916), 235 F. 95. Thus, Congress, in exempting amateur and distress broadcasts, etc., meant the statute to cover all other communications, of any kind whatsoever, wire, radio, interoffice communications, voice; *all others* purport to be within the scope of the statute.

Since clauses 2 and 4 apply to “any communication” of any kind it necessarily follows that they are violative of the due process clause and void for vagueness. It will not do to say that courts can apply the statute to various cases as they arise: this would be to embark upon a course of conduct so vigorously condemned by the Supreme Court in *U. S. v. Harris*, 106 U.S. 629, 27 L. Ed. 290:

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutionally granted power. But if Congress

steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to and when called upon must acknowledge encroachment upon the the reserve rights of the states and the people."

This is not a strained, technical or artificial construction of the statute. We neither take away from section 605 any word or any phrase nor insert any word or any phrase therein. The term "any communication" means just what it says, any communication. Criminal statutes must be strictly construed in favor of the defendant and against the government. Even the normal rule that a statute is presumed to be constitutional will not save § 605.

The statute says, "any communication" and that is what the statute means, unless this court either reads into it something which Congress did not put there or reads out of it something which is clearly an innocent act, and not "intended" to be within its scope. If it is necessary for the court to read into the statute a narrowing provision to save its constitutionality, Congress has therefore required men of common intelligence at the peril of their liberty to arrive at the same construction, and it has therefore "set a net large enough to catch all possible offenders" leaving it to the courts to "step inside and say who can be rightfully detained and who should be set at large." Such an imposition upon the ordinary man of common intelligence is far too great to find constitutional sanction in our system. Such a burden is neither due process nor fair play.

We further contend that insofar as § 605 purports

to authorize Congressional control over intrastate communications, the statute encompasses conduct clearly outside the scope of Congress' delegated power under the Commerce Clause, is an invasion of the Police Power of the several states and is therefore unconstitutional and void.

For all of the foregoing reasons, Appellants claim error in the indictment and in the rulings made by the lower court relative thereto.

STATEMENT OF PERTINENT FACTS ON MOTION TO SUPPRESS

Because of the complex factual picture surrounding this case, defendants deem it advisable to set forth in this Statement of Pertinent Facts those facts relative to the Motion to Suppress, the denial of which is assigned as one of the specifications of error.

Late on the night of Thursday, May 17, 1956, armed with a search warrant, issued by State District Court Judge Mears, which authorized a search of defendant Clark's home *only for "obscene and indecent photographs with accompanying sound recordings,"* five Multnomah County (Oregon) Sheriff's deputies, two newspaper reporters and a news photographer broke into the defendant Clark's house. Clark was absent at the time, though Clark's wife and another lady were there (M.S. 397-400). The raiders rummaged through Clark's house for more than two hours (and illegally seized a great many items—e.g., children's films, musical

recordings, etc.). *No obscene or indecent photographs, either with or without accompanying sound recordings were located.* Among the great many items which were illegally searched for and seized in Clark's house were five electronic tape recordings, each contained in an individual box, a minifon wire recording machine, and three spools of minifon recording wire (Def. Exs. 16, 17).

After the raiding party finished, the Sheriff of Multnomah County (who joined the raiders half way through the raid) made copies of the tapes during the early morning hours of Friday, May 18, 1956, and turned the copies over to the two newspaper reporters for the purpose of "preserving the evidence" (M.S. 102).

Since the following three days were non-judicial days—Friday the 18th being primary election day, and no court being held on Saturday, the 19th and Sunday, the 20th of May, it was Monday, May 21, 1956, before Clark was able to file his motion to suppress the evidence thus illegally seized from his house. The main thrust of Clark's motion was that the underlying affidavit, although sworn to by Langley (the then District Attorney for Multnomah County), was based solely upon information and belief, contrary to the clear requirements of Oregon law that search warrants issue only upon "probable cause, supported by oath or affirmation" (Oregon Constitution, Art I, § 9 and § 141.030, Oregon Revised Statutes). (At the time, Langley was then under investigation in the Portland vice investigation being made by the Attorney General of Oregon, assisted by the State Police, as a result of a

directive of the Governor of Oregon made following newspaper publication of revelations made by defendant Elkins, substantiated by tape recordings of Langley's consorting with hoodlums to "set up the town.") (Tr. 11-14) (Def. Ex. B—Motion for Continuance, Mar. 18, 1857).

State law requires the officer who serves the search warrant promptly to return it to the issuing court; however, it was not until May 22, the second day of the suppression hearing in State District Court, that the deputy sheriff in charge of the raid made his formal written return to the District Court. The five tape recordings seized in the raid were not produced in the District Court in the suppression hearing until Tuesday afternoon, May 27 (Def. Ex. 21, p. 70). Indeed, even before the deputy sheriff made his return on the warrant, Langley as District Attorney, had taken one of the tapes before the State Grand Jury, and Elkins and Clark who are also the defendants here, were charged with a violation of Oregon's wiretap law, ORS 167.570 (M.S. 352).

After a three-day hearing in State District Court, from May 21 to 23, inclusive, District Judge Mears, who stated that he had issued the warrant in misplaced reliance "upon the integrity" of Langley, found that the affidavit was faulty, since it was based solely on Langley's alleged information and belief, declared the search warrant to be a "nullity," and suppressed as evidence everything seized in the illegal raid. This ruling was made despite strenuous contentions by Langley's deputies that (1) returning of the indictment by the

State Grand Jury vested jurisdiction over the tapes and other seized items in the State *Circuit* Court, thus depriving the State *District* Court of jurisdiction; and (2) that the State District Court or Judge had no jurisdiction to entertain the motion to suppress because the five tape recording constituted evidence of violation of the federal wiretap statute, Title 47, § 605 (Ex. 12, Motion to Suppress).

As early as May 18, the day after the raid, District Attorney Langley, in a letter to the State Attorney General, was raising the spectre of a prosecution under the Federal wiretap statute (M.S. 343).

After the State District Court suppression hearing was finished, District Judge Mears, instead of returning the tapes and other seized paraphernalia to defendant Clark, ordered that,

“ . . . in view of the executive order from the Governor of the State of Oregon, the remaining property be and the same is hereby ordered impounded in the possession of the Sheriff of Multnomah County to be held at and released upon only the direction of the Attorney General of the State of Oregon or such higher circuit or supreme court before whom the matter may be heard.”

Thereafter, pursuant to this order, the sheriff, on May 29, 1956, turned over the five tape recordings, the minifon recording machine and three spools of minifon recording machine wire, together with other paraphernalia to the Attorney General and the Oregon State Police (M.S. 435-9). The Attorney General delegated the custodial responsibility for the various items to the

State Police, and acting thereunder, the State Police Officer Cross, on June 4, 1956, rented a safety deposit box in a bank and placed therein the boxes containing the five tapes, the minifon and the spools of minifon recording wire (M.S. 440).

On Monday, May 21, the Multnomah County Sheriff called in the F.B.I. for their "advice" and, as a result of this call, shortly after noon on May 22, F.B.I. agents Sherk and Smith went to the Multnomah County Court House where Deputy Minielly, who had led the raid on Clark's house, brought in the tape recordings (M.S. 174). Sherk commenced playing one of the tapes, but in the middle of it Minielly rushed back in the room, told Sherk the tapes were wanted by the grand jury, and thus ended the Sherk monitoring session (M.S. 195). Sherk said that he went to the Sheriff's office speculating (from reading newspaper accounts) that the tapes might "contain evidence of a federal violation." He said that the portion of the one tape which he did hear contained recorded conversations between several different individuals, that he didn't know "who the individuals were," although "he had reason to think" that he "recognized one of the voices" on the tapes, namely, the voice of District Attorney Langley (M.S. 188, 190).

Sherk said there were notes in each of the boxes, which notes contained names of individuals, purportedly being the individuals whose conversations were recorded on the tapes. He could not, however, remember the color of the tape boxes. Originally he said he saw

five tapes, each in a box (M.S. 193), but later he recalled that even though he saw five *boxes* there were only *four* tapes (Tr. 177). Sherk marked neither the tapes, the plastic tape reels, the notes, or the boxes, in any way, because he "wasn't over there to take those tapes into Federal custody or to mark them as evidence in Federal Court" (Tr. 179). This listening session which lasted about thirty minutes "was the only contact" that Sherk had with the five tape recordings (except for a brief visual inspection on August 13, 1956) (M.S. 236), until after the Federal search warrant was issued and executed on September 5.

While the tape recordings and the other items just mentioned were in State custody in the safety deposit box, F.B.I. agent Sherk, in company with two State Police officers, visited the bank on August 13, 1956, where the safety deposit box was opened, and Sherk then visually examined all of the items contained in the box—noticing the five tape recordings, the five individual boxes in which each one was contained, the Minifon and the three spools of Minifon recording wire. He did not, however, recall seeing the notes contained in the boxes of tape on this visit (M.S. 275-280, 290-294).

More than three weeks later, on September 5, 1956, Sherk went before the United States Commissioner and swore out an affidavit for a search warrant, the material portions of which are as follows:

" . . . heretofore, on May 22, 1956, in the State and District of Oregon, I listened to portions of electronic tape recordings of conversations which re-

cordings contained intercepted telephone conversations designed or intended for the use or benefit of a person or persons other than senders of such messages and the benefit of a person or persons not entitled thereto, in violation of Title 47, § 605, U.S.C.A. I am positive said recorded conversations and evidence of such intercepted telephone messages are among five tapes of electronic tape recordings and one minifon recording machine wire and four spool of minifon recording machine wire which said properties containing evidence of such recorded intercepted telephone conversations are located in Safety Deposit Box 912 at The First State Bank of Milwaukie, Oregon, 1036 Main Street, Milwaukie, Oregon. I further depose and say that I have personal knowledge that said properties are located on said premises and that I am positive that they are so situated." (Rec. 6).

Based upon this affidavit, and despite the fact that agent Sherk had not heard all of the five tapes, *but only a portion of one of them* (M.S. 176), *and had not heard any of the minifon recording machine wire* (M.S. 175), the United States Commissioner issued a search warrant (Rec. 7 and 8), which was immediately thereafter served by agent Sherk and another F.B.I. agent, by taking the five tapes, the minifon and recording wire into federal possession (Rec. 9).

Parenthetically, it should be noted that after the *state* wiretap indictment had been returned against the defendants Elkins and Clark, jurisdiction of the matter was taken over by the State Attorney General. Thereafter, defendants Elkins and Clark moved in State Circuit Court (which has jurisdiction of grand jury indictments in Oregon) for an Order suppressing as evidence on that indictment the five tape recordings and

the other items seized in the raid on Clark's house. This motion was pending at the time of the federal seizure on September 5, 1956, and on September 17, 1956, Circuit Judge Lonergan ruled that the raid on Clark's house was "very, very irregular and very improper," and hence that the "search and seizure was entirely illegal." The Judge stated from the bench that "*as a matter of law the search warrant was not legal and the search and seizure, therefore, was not legal either.* In that case I am allowing the motion in that regard, but I am turning over the matters that were found at that time to the Attorney General *to be used and disposed of only on order of the Court* (emphasis supplied)." the Judge further remarked that:

"If the grand jury of this county has turned any of the material or any of those things that were taken by this illegal search warrant to the government of the United States, the grand jury had no authority whatsoever to do anything of that kind. *No one has any authority to dispose of that or use it in any way without an order of the court.* No order of the court that I know of has ever been issued to anyone for that purpose." (Emphasis supplied) (Rec. 66-70 at 67).

One of the District Attorney's deputies, who had been called in by the Attorney General to assist in defending against the motion to suppress in State Circuit Court, instead recommended to the Court that the Elkins and Clark motion to suppress be granted, *so that a federal prosecution would thereby be facilitated* (M.S. 367).

Defendants herein, after they were indicted in this case on February 4, 1957, on a nine-count indictment,

timely moved the court below under Rule 41, F.R.Cr.P., for an order returning the property seized by F.B.I. agent Sherk from the safety deposit box and suppressing it as evidence in this case. Affidavits which were uncontradicted by the Government, were submitted by defendants in support of this motion. Also, defendants presented testimony from a great variety of state officials, from F.B.I. agent Sherk, as well as exhibits in support of the motion to suppress.

Several state and federal law enforcement officials testified that there was a common practice and general understanding existing between state and federal officials in this area that when evidence of federal violations or information concerning the same was uncovered by state officials, they would make the same available to federal officials, and vice-versa (M.S. 126-8, 133-5, 164-6, 327, 433, 443-4).

At the hearing on the motion to suppress, F.B.I. agent Sherk said that in his opinion the recorded conversations on the portion of the one tape which he listened to on May 22, 1956 were "telephone conversations based upon the buzzing noise that one hears when a telephone rings . . . what appeared to be long distance operators and secretaries handling telephone calls . . ."; he said that in his opinion, "part of the tape was a so-called room recording and part of it was a recording of telephone conversation" (M.S. 225).

When asked how he "knew" the recorded conversations were intercepted telephone conversations, Sherk answered:

“Well, they were not live telephone conversations, they were recorded. And therefore, they must have been intercepted.”

and further, he said:

“Well, I felt then and I feel now that the fact that they were there recorded on the tape was proof that they had been intercepted within the meaning of the Statute.” (M.S. 226).

Asked if he had *any other* reason to believe that the telephone conversations were intercepted, other than merely because “they were recorded on the tape,” he replied that he had “reason to believe—but not of my own knowledge” (M.S. 227).

When asked what knowledge of his own he had that the allegedly intercepted telephone conversations contained on the tapes were “designed or intended for the use or benefit of a person or persons other than senders” Sherk replied, “May I ask the Court to take judicial knowledge of the statements in the public press?” (M.S. 229). Sherk went on to reply, when the same question was repeated:

“First, *the considerable publicity and the public press* concerning tape recordings allegedly, according to the press, made by the same defendants that are here present. Secondly, *the fact that the tapes were obtained by the sheriff’s office, so they told me*, from a source other than the parties to the conversations appearing on the tapes.” (Emphasis supplied) (M.S. 230).

F.B.I. agent Sherk stated also that when he used the language in the search warrant: “said recorded conversations and evidence of such intercepted telephone

messages are among five tapes of electronic tape recordings," he meant the portion of *the one tape recording* which he heard on May 22 in the sheriff's office (M.S. 231-232). Sherk also testified that he was mistaken in making out his affidavit for search warrant for *four* spools of minifon recording machine wire when in fact there were only three (M.S. 232,293). Sherk also testified that he never heard or listened to the spools of recording machine wire until after the search was made on September 5 (M.S. 233). When asked why he sought a search warrant for five tape recordings in his affidavit, when he had only heard a portion of one tape, the witness replied, "Because there were five there. *I couldn't be sure which one contained the conversations that I had heard and I had reason to believe that all five of them contained intercepted telephone conversations*" (M.S. 233).

When asked why he had reason to believe that all five tapes contained intercepted conversations Sherk replied "Because *the notes* on all five boxes were *similar* and because *I had been informed* by the sheriff's office that they contained intercepted telephone communications" (M.S. 233-4).

This colloquy then occurred (M.S. 234-5):

"Q. Then you relied, then, in making this affidavit in this particular respect upon at least in part what someone else told you concerning those tapes, is that correct?

A. In part, yes.

Q. Did the notes themselves say they were intercepted telephone communications?

A. No, they did not.

Q. Did they say telephone on the notes?

A. No.

Q. Now, let's go to the spools of Minifon recording-machine wire, Mr. Sherk. Were there any notes on the spools of wire?

A. No.

Q. You never heard the spools of wire played until after you secured them under the search warrant, did you?

A. No.

Q. Then, of your own knowledge—up here (indicating)—of your own knowledge you did not know that the four spools of Minifon recording-machine wire or three, we are not going to quibble about it, you did not know that they contained anything, did you?

A. Only what I had been told.

Q. In other words, you were depending entirely upon what someone else told you in regard to the Minfon?

A. Plus the fact that the machine is designed for intercepting communications.

Q. Well, it is also designed, is it not, to pick up we will say, symphony music? It could?

A. Yes."

Sherk also admitted that with respect to the individuals whose names were on the notes in the box, and which he speculated might have referred to the individuals whose voices were recorded on the tapes, that with the exception of District Attorney Langley, he never talked to any of those individuals until after he signed the affidavit for the search warrant (M.S. 240-243).

Sherk also testified as follows (M.S. 281-282):

"Q. Did you know of your own knowledge on August 13 '56, that the tapes that you saw in box 912 in the Milwaukie State Bank were the same

tapes that you saw in the Sheriff's office on May 22, 1956?

A. I was convinced that they were but they had not been in my possession during all that time and that is the only way I could have known positively.

Q. Well, is it possible to have a tape on a reel and to hold it in your hand and look at it and say of your own knowledge that that is a certain particular tape from the tape itself?

A. Well, in this case—

Q. No. Just answer that question first and then we will go on.

A. Well, I suppose it would be possible to mark it in some way so that you could identify it. But I didn't do that in this case.

Q. The tape or the—

A. The tape.

Q. —reel?

A. No.

Q. Did you mark the reels?

A. No.

Q. You didn't mark the tape?

A. No.”

And further on page 290, the following testimony was given by Sherk:

“Q. By merely looking at a piece of electronic tape, and speaking of these five particular tapes now, by merely looking at the tape itself could you tell what conversations were on the tape, if any?

A. I am not an electronic expert but I feel sure that this answer is correct that *No you could not tell*.

Q. That's what I thought.

A. This particular type of tape, the sound markings on there leave no mark.

Q. They leave no mark?

A. No visible mark.” (Emphasis supplied).

Further on (M.S. 294) Sherk testified as follows:

“Q. Now, in between August 13, 1956, and Sep-

tember 5, 1956, did you see any of the articles that were seized under the search warrant on September 5, 1956?

A. No.

Q. You didn't visit the First State Bank of Milwaukie during that time?

A. No.

Q. Did you on September 5th prior to the execution of the search warrant visit the First Bank of Milwaukie?

A. No.

Q. Never at any time from August 13, 1956, until the box was opened pursuant to the search warrant did you see the articles that you seized under the search warrant?

A. No."

And further on (M.S. 297-298) the following occurred:

"Q. Now, Mr. Sherk, just before you opened the box did you know of your own knowledge—now, not through what some other person told you—but, did you know of your own knowledge that the articles which you found there were in the box immediately before you opened it at that time?

A. In the sense in which you have phrased the question, no.

Q. Yes. And, that's equally true that you did not know of your own knowledge that the articles which you subsequently seized under the warrant were in the box at the time that you made your affidavit; that is, of your own knowledge?

A. In the sense in which you have phrased that question no affiant appearing before a United States Commissioner in the Courthouse here could know of their own knowledge that anything was located at a point distant from there.

Q. Well—

A. So, the answer is no.

Q. The answer is No, isn't it?

A. Yes."

Sherk also admitted that the basis of his statement in the affidavit that the tapes were designed or intended for the use or benefit of a person or persons other than the senders of such messages was merely a "conclusion" of his, based upon the "nature of the tape" which he had heard May 22, 1956 in the Sheriff's office (M.S. 307).

Sherk also admitted that he didn't know anything about what was on the other four tapes from listening to the fifth tape; and that his only knowledge of what the other four tapes contained was that he had heard what was on them from other people; i.e., hearsay (M.S. 311).

However, before defendants were concluded with their interrogation of Sherk, on matters relating to his knowledge at the time he executed the affidavit, in support of defendants' theory that the federal search itself was invalid because of the insufficiency of the affidavit, and the affiants' knowledge, the Government objected to any such further inquiry (M.S. 313-315). Thereupon, the Court, in effect, sustained the Government's objection. The following, rather lengthy colloquy is quoted, however, because defendants deem it important in showing what we submit to be the error of the ruling:

"THE COURT: Well, I think your motion as now presented forces the Court to at this time rule on one of the very substances of the matter.

May I ask you, Mr. Luckey—

MR. CRAWFORD: May I be heard?

THE COURT: Surely you may be heard. But, let me lay the premise first.

MR. CRAWFORD: Pardon.

THE COURT: May I ask you, Mr. Luckey, what is the Government's position—do you rely upon a valid search and seizure under the—let me put it this way: Do you contend that the possession of the articles by this Court now depends upon the validity of the Federal search and seizure?

MR. LUCKEY: I don't suggest, Your Honor, that the validity of the Government's present possession depends upon the validity of the search and seizure as to these defendants.

THE COURT: Yes. I understand your position.

MR. LUCKEY: Because, unless there is an original—unless the Government has infringed upon their constitutional rights.

THE COURT: In other words, I take it it is your position that this Court's inquiry is not whether or not—it makes no difference whether or not the Federal seizure was pursuant to a valid search warrant.

MR. LUCKEY: That's right. Because, I suggest, Your Honor, that under the cases if the State authorities who first themselves conducted the illegal search and seizure had handed them over on a silver platter to the Federal authorities they would have been admissible.

THE COURT: Now, of course, we understand—

MR. LUCKEY: These are subsequent matters of getting them that are mere formalities and serve to get them there perhaps by a more delicate and discreet manner. But, as to the necessity of sustaining the search warrant, I don't for one minute suggest that it isn't a valid search warrant. But, my point is that we are wasting time on an inquiry that isn't relevant.

THE COURT: Well, if that's the effect, you force me right now to decide the question.

May I inquire now from the defendants? Is it your position in this matter that if this was not a valid search warrant the Government can in no event sustain their rights to this property?

MR. CRAWFORD: That is one of our grounds.

THE COURT: All right. I will have to hear you on it, then, because I have got to determine the phase of this motion as to, first of all, whether the Government will not abandon its position. It insists that it is a valid search warrant. So, now, I have got to determine whether or not it makes any difference whether or not it is a valid search warrant.

MR. CRAWFORD: Well, I am not through my evidence on whether or not it is valid.

THE COURT: The Government has forced me to rule whether or not your inquiry is even proper.

MR. CRAWFORD: Your Honor, I don't believe that the United States Attorney has—it has occurred to him what the Government's position is at this time.

Now, I could appreciate and agree with the Government's position with these defendants not indicted. But, now they are indicted. What are they indicted for? They're indicted because, necessarily, in order—and in order to prove the indictment and each count thereof the Government must prove that these defendants were in possession or were the owners of these very articles which the defendants are seeking to suppress.

Now, that, you see, is after indictment. Now, before indictment we certainly would be in a different position. Before indictment I believe it unquestionably would be incumbent upon the defendant in order to maintain this motion to suppress to show, one—either, one, they were the owners—

THE COURT: Well, I don't want to interrupt your train of thought on it, Mr. Crawford, but we are not involved in that question now.

MR. CRAWFORD: Well, I thought he raised the very question? I took notes? He says the—

THE COURT: Well—

MR. CRAWFORD: He said that the defendants must accept the illegality of the search without admitting the peril. I took it—I understood him

to say that we must show that we had an interest in this search.

THE COURT: Granted, the District Attorney did say that. But, he said—of course, your evidence is not in yet.

MR. CRAWFORD: It isn't in, Your Honor.

THE COURT: But, that isn't his point of inquiry. His point of inquiry is now objecting to your line of examination of this witness as to his knowledge in connection with the search warrant, in his execution of the search warrant. Now, the Government has raised the question that it does not make any difference, conceding for the sake of argument that this was an invalid search warrant—it makes no difference to the Government's right to use this evidence.

MR. CRAWFORD: All right.

THE COURT: So, I have asked you now do you—

MR. CRAWFORD: I will show that:—

THE COURT: All right.

MR. CRAWFORD: —I will show, then, that on May 17, 1956, that these articles, as far as we know—and, when Your Honor hears the evidence you will realize why I say 'as far as we know'—were in the residence and home, dwelling house and abode of the defendant Clark where they were taken by virtue of an illegal raid by the Sheriff of Multnomah County, Oregon; that thereafter the same identical articles were given by the sheriff of Multnomah County, Oregon, to the Attorney General of the State of Oregon—or, rather, into the hands of one of the officers of the State Police for and on account of the Attorney General of the State of Oregon in the presence of the Attorney General of the State of Oregon and that thereafter the same tapes and other evidence—other articles of evidence were under the control and in the possession of the same Oregon State policemen; and that pursuant to this search warrant which is in evidence here and in the files of this case the

F.B.I. through its agents took and now have possession of the tapes. And, I will show an unbroken line, I do believe.

THE COURT: All right. I haven't yet been able to make the query that's in my mind. I can't get it across.

Now, accepting your statement as it is, do you contend that the Government's possession would still be illegal if the State policemen had turned them over to Mr. Sherk without a search warrant?

MR. CRAWFORD: Yes.

THE COURT: Then, it is your position if the search warrant is valid then the Government's right to it—had a right to take them from the police officer?

MR. CRAWFORD: No.

THE COURT: All right. Then, why do you make an inquiry as to the illegality of the search warrant?

MR. CRAWFORD: As I stated here before, Your Honor—I will restate my theories. And, I believe that I am on firm ground. 1. If on the original raid—

THE COURT: Now, we are not concerned with the original raid. We are only concerned at this point of inquiry as to whether or not the search warrant held by Mr. Sherk was a valid search warrant.

MR. CRAWFORD: That's all I was inquiring about.

THE COURT: That is the basis of Mr. Luckey's objection. Because, he said it doesn't make any difference whether it's valid or not.

MR. CRAWFORD: Well, I do not agree with Mr. Luckey. Definitely, emphatically not. It's hard, Your Honor, to apply—

THE COURT: Well, now, let me put it this way: then, your position about it is that, assuming you cannot prevail upon your theory that the Federal Government had a hand in the initial raid and that they are free of any activity in that part

—nevertheless, their subsequent search warrant was invalid and they had no authority to take it from the State policemen?

MR. CRAWFORD: That's correct, among other things. And, we have other reasons, also, which I have heretofore stated.

THE COURT: Well, I am forced to decide it. I have been listening to all of the testimony and I have reached this conclusion: that it does not make any difference in the ultimate end of this matter whether or not the F.B.I. had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal it had to be upon some other grounds under the theory of the defendants other than the fact that he held an illegal search warrant.

MR. CRAWFORD: In other words, now, Your Honor, is definitely ruling at this time?

THE COURT: From here on out the Court will make no inquiry.

MR. CRAWFORD: In other words, I want to make sure that I understand—

THE COURT: I want you to understand it.

MR. CRAWFORD: —so that I don't further intrude upon Your Honor's ruling. I will save an exception of Your Honor's ruling, of course.

THE COURT: Yes. I want your record to be protected.

MR. CRAWFORD: *Your Honor's ruling, as I understand it, is that it will have the effect of preventing the defendants from further inquiring into the validity of the search and seizure, September 5, 1956, made by the Federal Bureau of Investigation?*

THE COURT: *No. No. That may be—under your theory that may be so permeated that it would revert back to the original time. I am merely restricting this ruling to this: That in the ultimate consideration of the matter it makes no difference whether Mr. Sherk had in his possession a search warrant issued pursuant to the Federal act or not.*

His right of possession must be based upon some other ground than that of a valid search warrant in his possession. (Emphasis supplied).

Now, that is the theory of the Government.

MR. CRAWFORD: I wonder if the Reporter would read that to me.

THE COURT: I will try once more.

MR. CRAWFORD: I will have to state sincerely to Your Honor that I was trying to understand the effect of Your Honor's ruling and what it would prevent me from attempting to do.

THE COURT: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis of Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.

MR. CRAWFORD: Will the Government admit the invalidity of the search warrant?

THE COURT: No. The Government merely says that it does not make any difference whether it is invalid or valid. So, the Court will accept that theory. From here on out the Court will not concern itself with whether or not there was ever a search warrant issued upon an affidavit by Mr. Sherk."

SPECIFICATION OF ERROR NO. 2

The Court below erred in denying the motion to suppress, for the following reasons, which are briefly summarized here and are discussed and argued more fully below.

1. The Federal search warrant of September 5 was invalid, illegal and void, by virtue of the insufficiency of the affidavit of F.B.I. agent Sherk and the demonstrated insufficiency of his knowledge.

2. The State search warrant of May 17, 1956, being void, the search and seizure was illegal and evidence taken thereunder is inadmissible in a Federal criminal prosecution.

3. The state officers in conducting the illegal search and seizure in Clark's house had no real intention of enforcing State law, thus the sole object was a Federal prosecution.

4. Because of the common practice and general understand between Federal and State officials that evidence of Federal violations uncovered by State officers would be turned over to Federal officials for Federal prosecutions, the original illegality of the State search in binding upon the Federal officials and prevents admissibility.

5. The property seized from the bank under the Federal search of September 5, 1956 was in the custody of State courts and the Federal court had no jurisdiction to seize the same.

1. The Federal search and seizure was illegal:

Although Sherk was a lawyer and an F.B.I. agent with sixteen years experience, the state of his knowledge, on September 5, when he executed the affidavit for the Federal warrant, was clearly insufficient on a number of counts:

- a) He had never heard four of the five tapes;
- b) He had never heard the three spools of wire;
- c) He had no knowledge of the manner of interception;
- d) He had no knowledge of lack of consent by the participants to the conversations;
- e) He had no knowledge that the tapes were designed or intended for a use which would violate the wiretap statute.
- f) More than $3\frac{1}{2}$ months elapsed between his hearing of a portion of one tape, and the execution of the affidavit;
- g) More than 3 weeks elapsed between his visual inspection of tapes at the bank and his execution of the affidavit;
- h) He never marked or identified the tapes, or their containers until after he seized them on September 5, 1956.

The case of *Schencks v. U. S.*, (D.C. Cir. 1924), 2 F.2d 185, lays down this governing rule:

“ . . . If the peace officer has reason to believe and does believe that a search or seizure ought to be

made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statements made by him to the officer.

"Peace officers, to the credit be it said, zealously endeavor as a rule to bring lawbreakers to justice, but unfortunately they are easily satisfied as to the guilty of an accused, although having no legal evidence to convict. To permit them to search for evidence because they depose that they had reason to believe and did believe that the law had been broken, or because they depose that they were *informed and believed* that certain facts existed, would leave the home, the property, and the person of the citizen at the mercy of mere suspicion, and of misstatements and misinformation for which no one could be held accountable."

See also *U. S. v. Reynolds* (D.C., D.C., 1953), 111 F. Supp. 589; *U. S. v. Lassoff* (D.C. Ky., 1957), 147 F. Supp. 944; and Annotation 14 ALR 2d 605; cf. *Washington v. U. S.* (D.C. Cir., 1953), 202 F.2d 214; *Brinegar v. U. S.*, 338 U.S. 160, 93 L. Ed. 1879.

Furthermore, the only possible knowledge that affiant Sherk acquired as to the illegal character, if any, of the tapes was acquired on May 22, 1956 (105 days prior to the September 5th affidavit, when he heard a portion of

one tape, not all five). This, we submit, was too remote in time to constitute "probable cause." See the annotation at 162 ALR 1406, which lays down the rule that the observation of the alleged offense must not be too remote from the date of the affidavit, or else probable cause will not exist.

In *Dandrea v. U. S.* (8th Cir. 1925), 7 F.2d 861, a lapse of time from December 19, 1922—date of alleged observation—and February 1, 1923—date of affidavit—was such as to render the warrant void. If 43 days was too much, would not the time lapse here—May 22 to September 5, or 105 days, condemn the warrant?

In *U. S. v. Dziadus* (D.C., W. Va. 1923), 289 F. 837, a time lapse from August to November 1, roughly 90 days) was held to void a warrant.

The annotation mentioned, 162 ALR at pages 1414 to 1418, lists the cases where the time lapse had been considered, and concludes that less than 20 days will not void the warrant, more than 30 days will and between 20 and 30 is a "twilight zone," in which the cases go both ways.

Here, the time lapse was 105 days.

See also *U. S. v. Nichols* (D.C. Ark. 1950), 89 F. Supp. 953, where a lapse of 21 days, with other factors, was held to render the warrant void.

2. Evidence illegally obtained by state officers is inadmissible in Federal criminal prosecutions.

It has long been thought to be the rule that Federal courts would not bar evidence when it was improperly seized by State officials operating on their own, and where there was no Federal participation, cooperation and ratification. This theory is thought to stem from *Weeks v. U. S.*, 232 U.S. 383, 58 L. Ed. 652 (e.g., annotations 50 ALR 2d 531, 573; 100 L. Ed. 239). Nearly every circuit has had occasion to state such to be the rule, e.g.:

- 1st—*Rettich v. U. S.* (1936, CA 1st Mass.), 84 F.2d 118.
- 2nd—*U. S. v. Pugliese* (1945, CA 2d N.Y.), 153 F.2d 497.
- 3rd—*Burkis v. U. S.* (1932, CA 3rd N.J.), 60 F.2d 452.
- 4th—*Wheatley v. U. S.* (1946, CA 4th W. Va.), 159 F.2d 599.
- 5th—*Grimes v. U. S.* (1945, CA 5th Ga.) 234 F.2d 571.
- 6th—*Collin v. U. S.* (1956, CA 6th Tenn.), 230 F.2d 424.
- 7th—*U. S. v. Moses* (1956, CA 7th Ill.), 234 F.2d 124.
- 8th—*Jones v. U. S.* (1954, CA 8th Mo), 217 F.2d 381.
- 9th—*Anderson v. U. S.* (1956, CA 9th Nev.), 237 F.2d 118.
- 10th—*Gallegos v. U. S.* (1956 CA 10th N. Mex.), 237 F.2d 694.

Mr. Justice Frankfurter, in announcing the judgment, in his opinion which was joined by three other justices, said:

“Where there is participation on the part of federal officers it is not necessary to consider what would

be the result of the search had been conducted entirely by State Officers."

Less than a year ago, in *Benanti v. U. S.*, 355 U.S. 86, 2 L. Ed. 2d 126, at 131, the court, in an unanimous decision, again said the question was an "open" one:

"N. 10. *It has remained an open question* in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in Federal Court *despite the Fourth Amendment*. (See *Lustig v. U. S.*, 338 U.S. 74." (Emphasis supplied).

Similarly, in the *Rea* case, *Rea v. U. S.* (1956), 350 U.S. 214, 100 L.Ed. 233, the Supreme Court, in enjoining a Federal agent from turning over evidence he had illegally seized, or in giving testimony, for a State prosecution, said that:

"They (F.R.Cr.P.) are drawn for innocent and guilty alike. They prescribe standards for law enforcement. *They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings.*"

The trend thus shown and foreshadowed by *Rea*, *Benanti* and *Lustig* was clearly predicated from the language of the Court in *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782 (decided the same day as *Lustig*):

"Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. *But basic rights do not become petrified as of any one time*, even though, as a matter

of human experience, some may not too rhetorically be called eternal verities. *It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing* as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

"To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.' Davidson v. New Orleans, 96 U.S. 97, 104, 24 L. Ed. 616, 619. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since Davidson v. New Orleans was decided.

* * * *

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

All of the foregoing adds up to one simple fact; that the Supreme Court will not permit illegally obtained evidence to be used in Federal Courts whenever the illegality results from official excesses, Federal or State. As Justice Murphy remarked in *Lustig*, 338 U.S. at 80, 93 L. Ed. at 1824: "Whether state or federal officials did the searching is of no consequence to the defendant and it should make no difference to us." (Concurring opinion).

And see Mr. Justice Black's concurring opinion in *Wolf*, 338 U.S. 40, 93 L. Ed. 1792:

"The Fourth Amendment was designed to protect people against unrestrained searches and seizures by sheriffs, policemen and other law enforcement officers. Such protection is an essential in a free society. And I am unable to agree that the protection of people from over-zealous or ruthless state officers is any less essential in a country of 'ordered liberty' than is the protection of people from over-zealous or ruthless federal officers. Certainly there are far more state than federal enforcement officers and their activities, up to now, have more frequently and closely touched the intimate daily lives of people than have the activities of federal officers. A state officer's 'knock on the door . . . as a prelude to a search, without authority of law,' may be, as our experience shows, just as ominous to 'ordered liberty' as though the knock were made by a federal officer."

This trend has not escaped notice, nor has it been unproductive of results. On October 2, 1958, the Court of Appeals for the District of Columbia, reversed a conviction in the District of Columbia obtained through evidence seized illegally from defendant by Maryland officers operating entirely on their own account. *Hanna*

v. U. S., — F.2d —. This Court, in overruling prior decisions in that circuit (*Shelton v. U. S.*, 169 F.2d 665) traced the “supposed” rule, and its demise under the force of the Supreme Court’s language in *Wolf*, *Lustig* and *Benanti*, and adopted what defendants here submit is the true and proper rule:

“Oddly, even since the *Wolf* decision several Court of Appeals have followed *Weeks* as to the admissibility of evidence obtained by state officers in federal trials on the no longer tenable theory that the Constitution does not prohibit unreasonable searches and seizures by state officers. E.G., *Serio v. United States*, 5th Cir. 1953, 203 F.2d 576, 578, cert. denied, 346 U.S. 887; *United States v. Moses*, 7th Cir. 1956, 234 F.2d 124, 125; *Gallegos v. United States*, 10th Cir. 1956, 237 F.2d 694, 696. Overlooking the fact that since the *Wolf* case an unreasonable state seizure must be recognized as a violation of the Constitution, these courts have failed to come to grips with the problem whether there should be in the federal courts a comprehensive rule that evidence obtained by invasion of a constitutional right, whether by a state or a federal officer, is inadmissible. Cf. *Jones v. United States*, 8th Cir. 1954, 217 F.2d 381.

* * *

“In cumulative effect these several pronouncements by so many Justices of the present Court support the rational argument that the *Weeks* and the *Wolf* decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts. At very least it seems clear that this is a position toward which several Justices are strongly inclined, with one Justice apparently in disagreement and others indicating no more than that they regard the question as open. Certainly, neither the *Weeks* holding as to state seized evidence nor our own *Shelton* decision can properly be regarded as binding precedents

in the light of the subsequent Wolf ruling and the cited indications of the present views of so many justices.

“On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by violation of the Constitution should be excluded. * * *

* * *

“This concern with the integrity of the judicial process must be most serious when the evidence has been obtained by a violation of the Constitution itself. The effectiveness of courts must always depend in large measure upon the respect which their processes command by reason of the integrity they reveal. From that point of view the courts of the United States, the ultimate guardians of the Constitution, cannot afford to play the ‘ignoble part’ by themselves permitting the use of unconstitutionally obtained evidence, solacing and absolving themselves by deploring the unconstitutional seizure and pointing out that in some other proceeding sanctions can or should be imposed against the violation of our fundamental law. This very point was made in the Weeks case with reference to evidence which federal officers had obtained by unreasonable search:

‘The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.’ 232 U.S. at 392.

But the Wolf case has made this reasoning equally applicable to the now equally unconstitutional seizures by state officers.

“Beyond the issue of judicial integrity, we should not assume that the refusal of the federal courts to permit the use of improperly obtained evidence will have no effect in persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence. In the Weeks case the Supreme Court went so far as to say that if articles can be seized illegally by federal officers ‘and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.’ It cannot rationally be argued that the constitutional protection is so gravely impaired by using such evidence in federal courts when a federal officer has violated the Fourth Amendment, but that there is no significant impairment when it is a state officer who has been guilty of an equivalent violation of the Fourteenth Amendment. Perhaps the sanction of excluding such evidence from federal trials has a greater deterrent effect upon federal officers than upon state officers. But there is no calculus to measure such a difference, nor is it the kind of difference which warrants opposite conclusions as to the admissibility of the evidence.”

The State search was condemned unequivocally as grossly violative of defendants’ rights by two Oregon Courts directly (Tr. of Rec. 61 and 70); the Government, in the hearing on the motion to suppress, conceded for purposes of the motion, the illegality of the State search (M.S. 84). The Federal trial judge more than once expressed his opinion that the State search was illegal. Finally, a third Oregon court, Circuit Judge Redding, in enjoining State officials from testifying as to the search and its effects called the search an

“abuse of the State Courts’ own process” (Def. Motion for Stay, Ex. A).

It is, therefore, submitted that this conviction should be reversed, for the reason that it was obtained with and based on illegally-obtained evidence in violation of defendants’ rights under the Fourth and Fifth Amendments.

3. Where state officers illegally seized evidence solely for the purpose of enforcing state law, such evidence is inadmissible in Federal court.

Two things are clear, here, *first*, the state search of May 17, 1956, was so flagrantly illegal from the inception that, though they disclaimed such at the hearing, the District Attorney and his chief deputy must have known that no state prosecution would be had, and hence they must have contemplated a Federal prosecution. The affidavit for the state search was based solely on “information and belief” (Tr. of Rec. 59-60) which District Attorney Langley testified he gained in the following fashion (M.S. 45-49):

“And, Mr. Brad Williams called Mr. Herder on the phone and I listened to Mr. Herder’s conversation in which he said that he knew Raymond Clark; that Raymond Clark was in the business.

THE COURT: Well, you understand this is all hearsay, Mr. Langley, and the only purpose is that following this conversation you made this affidavit, is that right?

THE WITNESS: That’s correct.

THE COURT: All right.

THE WITNESS: Now, Mr. Herder said that he knew Mr. Clark and that Mr. Clark was in the business of leasing and renting these moving pictures

to male stag parties and that these moving pictures were in—were kept in Clark's house.

Now, based upon that information I made this affidavit on information and belief upon my firm conviction which I still have, that information furnished by a police officer on information—and which, I may—on information and belief establishes probable cause which is the basis for a legal search warrant.

MR. CRAWFORD: Q. And, you further state in your affidavit that 'certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of said Raymond Clark to exhibit said photographs' were at that address. Is that true?

A. That's correct.

Q. Now, then, who did you get that from, Mr. Herder?

A. Yes.

Q. He told you?

A. He told me that Clark was in the business of renting to male—

THE COURT: You told us that, that he gave you this address.

THE WITNESS: Pardon me. He told me—he understood they were in Clark's house.

THE COURT: All right.

MR. CRAWFORD: Q. In Clark's house?

A. That's correct.

Q. And that he was in the business of renting these indecent pictures, is that correct?

A. That Clark was. Herder wasn't.

Q. That Clark was. Yes. Now, you're sure that Mr. Herder told you that?

A. Well, I am not repeating anything I am not sure about, counsel.

Q. Oh. Fine. All right. Now, the next paragraph—view the second paragraph if you will direct your attention to that, Mr. Langley. Now, you will notice that the next paragraph of the affidavit specifically states that that paragraph is on information and

belief. Will you please read the second paragraph to yourself?

(Whereupon the witness did as requested)

MR. CRAWFORD:Q. You have read that?

A. Yes, sir.

Q. Now, did you mean to—at the time that you executed this affidavit that the second paragraph was on information and belief, or was it made of your own knowledge?

A. So far as this affidavit is concerned all the information contained on it was made on information and belief.

Q. And, does that apply to the second paragraph?

A. It applies to the entire affidavit.

Q. Fine. I direct your attention to the third paragraph 'I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon.' Is that made on information and belief?

A. No sir; he told me that himself.

Q. He told you that himself, is that correct?

A. That's correct.

Q. Do you know Mr. Herder?

A. No, I do not.

Q. Have you ever seen him before this date?

A. I wouldn't be able to say about that, counsel.

Q. Do you know that the man you were talking to was Herder?

A. Well, he said so. He is the Chief of Police at St. Helens.

Q. And he told that to you?

A. Well, he said it on the telephone.

Q. Well, did he tell it to you?

A. I heard it.

Q. Well, was Mr. Herder talking to you?

A. I heard it, counsel.

Q. No. Please answer my question.

A. I am giving you the best answer I can.

Q. Was Mr. Herder talking to you?

A. The man who talked to me identified him-

self as Mr. Herder as being the Chief of Police of St. Helens.

Q. Now, just so there will be no misunderstanding, Mr. Langley, you understand that what is meant by a conversation between two people on a telephone? Do you understand that?

A. I think so.

Q. Now, were you and Mr. Herder talking together on a telephone?

A. Counsel, I have explained that the best I can that Mr. Williams called Mr. Herder on the telephone and I overheard the conversation.

Q. How did you overhear it?

A. Well, I was listening on another extension.

Q. You were listening on an extension line?

A. That's correct.

Q. Did Mr. Herder know that you were listening?

A. No. But Mr. Williams did.

Q. Mr. Williams did?

A. Correct.

Q. But, Mr. Herder, when he gave this information that you say he gave, didn't know that you were on the extension?

A. Well, of course, you have to ask him that. In my opinion, I don't think he knew." (M.S. 49).

Chief Herder took the stand and denied that this conversation ever took place (M.S. 82); further he swore that his (Herder's) prior conversation with Williams was "hearsay" and that he "definitely did make it plain to Mr. Williams" that it was hearsay (M.S. 83).

This affidavit was so flagrantly illegal that it is clear that the moving spirits—the District Attorney and his deputy—had no real pretense in enforcing state law. Their repeated suggestions of a Federal violation, and the hectic way they sought it, are further indication of their real purpose—a Federal prosecution.

Furthermore, though both Langley and his deputy claimed they were seeking a state violation (M.S. 67-68, 376), it is now clear that there could be no state prosecution under the state wiretap law, for the reason that Sec. 605, the Federal statute, has "pre-empted" the field; *Benanti v. U. S.*, 355 U.S. 96, 2 L. Ed. 2d 126 (December 9, 1957).

Thus the *Gambino* rule is here applicable, *Gambino v. U. S.*, 275 U.S. 310. Consequently, denial of defendants' motion to suppress was error.

4. The motion to suppress should have been granted because of the common practice and general understanding between Federal and State officials.

A virtually unbroken string of Federal and State law enforcement officials testified that in the Oregon area a "common practice and general understanding" existed by which evidence and information obtained by state officers would be turned over to federal officers for prosecution purposes (M.S. 126-8, 164-6, 433 and 443-4), and vice versa (M.S. 327).

Such "general understanding and common practice" that the Federal officers will adopt and prosecute offenses renders the results of the state seizure inadmissible in Federal criminal prosecutions. *U. S. v. Butler*, 10th Cir., 1946, 156 F.2d 897; *Fowler v. U. S.*, 62 F.2d 656; *Sutherland v. U. S.*, 92 F.2d 305; and *Lowery v. U. S.*, 128 F.2d 477.

Hence the Motion to Suppress should have been granted, and it was error for the Court below to deny it.

5. The Federal court had no jurisdiction to seize the evidence under the Federal search warrant of September 5, 1956, because the same were in custodia legis.

The United States Commissioner, in issuing the Federal search warrant of September 5, 1956 (Tr. of Rec. 7-8), was simply an "arm of the court," *Todd v. U. S.* (1895), 158 U.S. 278, 39 L. Ed. 982; *U. S. v. Berry*, 4 F. 779. Consequently, the Federal Court undertook to take possession then in the property of the State Courts.

The Supreme Court said, in *Fischer v. American Ins. Co.* (1942), 314 U.S. 549, 86 L. Ed. 444:

"... the federal court may not 'seize and control the property which is in the possession of the state court' nor interfere with the state court or its function." (Emphasis supplied).

And the court described, as a well-settled principle" the following:

"Where a court of competent jurisdiction has by appropriate proceedings taken property into its possession through its officer, the property is thereby withdrawn from the jurisdiction of all other courts. *Such possession of the res by the State court disabled the federal court from exercising any control over it.*" (Emphasis supplied).

And for another statement of the rule, see the case of *Lion Bonding Co. v. Karatz* (1922), 262 U.S. 77, 67 L. Ed. 871, at 880, wherein it is said:

"Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officer, the property is thereby withdrawn from the jurisdiction of all other courts. (Citing cases). Possession of the res disables other courts of coordinate jurisdiction from exercising any

power over it. (Citing cases). The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies related thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit another court to interfere with such possession and jurisdiction." (Emphasis supplied).

And see *Ponzi v. Fessenden* (1922), 258 U.S. 254, 66 L. Ed. 607.

"We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two system are maintained are deeply interested that *each system shall be effective and unhindered in its vindication of its own laws*. The situation requires therefore not only definite rules fixing the powers of the court in cases of jurisdiction over the same persons and things in actual litigation but also a spirit of comity and mutual assistance to promote due and orderly procedure.

* * * *

"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Mathews in Covell v. Heyman, 111 U.S. 176, 28 L. Ed. 390, 4 Sup. Ct. 355, as follows:

'The forbearance, which courts of coordinate jurisdiction, administered under a single sys-

tem exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is the principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. *It is a principle of right and law, and therefore, of necessity.* It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and *when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the juridicial power of the other, as if it had been carried physically into a different territorial sovereignty.'*” (Emphasis supplied).

See also *U. S. v. Monjar* (1946), 154 F.2d 954; *Daeuter Brewing Co. v. U. S.* (1925, 3rd Cir.), 8 F.2d 1; *Pappas v. Lufkin*, 17 F.2d 988; *Jennings v. Buterbaugh* (1950, D.C., Pa.), 89 F. Supp. 553.

Hence, though two state courts suppressed the seized items as evidence, they did not return them to the defendants, but rather retained custody of them (Rec. p. 65, pp. 57-70).

The court, having no jurisdiction over the seized evidence, ought to have sustained defendants' Motion to Suppress.

SPECIFICATION OF ERROR NO. 3

The lower court's action in denying, on March 20, 1957, defendants' request for a 90 day postponement and allowing only a 20 day postponement (from March 26 to April 16, 1957) and the court's action on April 15, 1957, in denying completely defendants' request for a 30 day postponement, constituted error in that it resulted in a denial to defendants of due process under Amendment V and a denial of right to counsel under Amendment VI of the U. S. Constitution.

Statement of Pertinent Facts on Motion for Continuance

Defendants herein contend that they and each of them were deprived of their right to due process under the Fifth Amendment and to assistance of counsel under the Sixth Amendment by virtue of the manner in which they were forced to trial in this case. A reference to the affidavits filed in support of Motion for Continuance, and the Supplemental Motion for Continuance, *none of which* affidavits were denied or contradicted in any way whatsoever, together with the testimony of defendant Elkins found at pages 30 to 40 of the transcript of motion for continuance shows the following (Rec. Nos. 6, 7, 8 and 9, pp. 24-38; Nos. 24-26, pp. 88-103):

- 1) Indictment was returned February 4, 1957.
- 2) Defendants arrested and released on bail February 6, 1957.
- 3) Defendants arraigned February 18, 1957, pleas of "not guilty" entered, the court allowing 30 days within

which to file motions; (defendant Elkins' attorney being Mr. Hannon and defendant Clark being represented by Attorneys Crawford and Fallgren); defendants' time from February 6 to February 18 being completely occupied in consultation with Staff members of the McClellan Committee, conference with the staff of Oregon Attorney General, then engaged in the Portland vice expose, and with appearances before the State Grand Jury investigating the vice expose.

4) Defendants, under subpoena by the McClellan Rackets Committee, left for Washington, D. C. on February 20, 1957.

5) On March 2, by Minute Entry, case set for trial March 26, 1957.

5(a) Defendant Elkins, on March 11, 1957, employed attorneys Crawford and Fallgren, Attorney Hannon having withdrawn.

6) Defendants in Washington, D. C. continuously from February 20th to March 16, 1957, testifying before or consulting with the staff of the McClellan Committee; (save for a period of about 60 hours from March 2 to 4, when defendant Elkins flew to Portland for an appearance before the State Grand Jury and then flew back to Washington, D. C., not being able, however, to spend any time at all on this trip with his attorney).

7) Defendants, having finished their McClellan Committee appearances, returned to Portland late March 16 or early March 17, 1957.

8) On March 18th, defendants, through their at-

torneys, Crawford and Fallgren, filed a motion for continuance of 90 days based upon two grounds, (1) lack of time to prepare, and (2) prejudicial publicity each preventing a fair trial; this motion was heard on March 20, 1957, at which time the lower court agreed that he was "quite of the opinion that counsel *has not had adequate time nor the parties have had an adequate time within which to prepare* for trial so far as the March 26th trial date is concerned." (Emphasis supplied). Instead of allowing the 90 days requested by the defendants, the Court allowed a continuance of only 21 days, or from the 26th of March to the 16th of April, 1957, in the trial date. (It should be noted that considerable time was used preparing the Motion for Continuance, which was lengthy, and was accompanied by a bulky file of newspapers and magazines.)

9) Counsel for defendants prepared and filed on March 19, 1957, Motion for Discovery under Rule 16 or the Federal Rules for Criminal Procedure seeking a right to inspect and copy tape recordings in the plaintiff's possession.

10) On March 19, defendants filed a seven-part Motion to Dismiss the Indictment, supplemented by a Supplemental Motion to Dismiss on March 29th, these Motions being argued on March 29 and April 9, 1957.

11) On March 25, 1957, defendants filed a Motion to Suppress the illegally seized tape recordings as evidence, together with an affidavit (containing exhibits) in support thereof, plus twenty-three page memorandum of points and authorities relating to the Motion to Suppress.

12) On April 3, 1957, defendants caused to be served subpoena duces tecum upon FBI agents in Portland, and after plaintiff's motion to quash was filed, an amended subpoena duces tecum was served on April 8, 1957, to which also, plaintiff filed a motion to quash.

13) On April 9, 1957, counsel argued the Supplemental Motion to Dismiss, and immediately thereafter, argued the Motion to Quash the Subpoenas Duces Tecum; immediately thereafter, on April 9th, defendants commenced the taking of testimony in support of their Motion to Suppress. This consumed the balance of the 9th, all day 10th, April 11th and April 12; at the end of which, the Court denied the Motion to Suppress.

14) On April 11th and again on April 12th, in the evening thereof, defendant Elkins having become "concerned that the task of adequately preparing and presenting the various preliminary motion and matters in the case was so time consuming that other counsel would be needed to adequately prepare for the trial on the merits of this case, for the reason that the serious preliminary matters had occupied all of the time of my then attorneys that normally would be available for the preparation of the defense to the trial" (affidavit of defendant Elkins (Rec. 24, p. 94), substituted Walter H. Evans, Jr. as his attorney, Crawford and Fallgren continuing on as attorneys for defendant Clark.

15) April 13, 1957, a Motion for 30-day Continuance was made on behalf of defendants (together with supporting affidavits and exhibits) based on lack of time for preparation and upon continuing vicious, flamboyant and prejudicial newspaper publicity against defendants.

16) On April 13, 1957, defendant filed, in State Court, a suit to enjoin state officers from testifying in federal court with respect to items seized in the illegal raid committed by state officers on defendant Clark's house, based in part upon the *Rea* doctrine (— U.S. —, 100 L. Ed. 233).

17) On April 15, 1957, defendants introduced testimony on and argued their Motion for a 30 day Continuance, which Motion was denied.

18) On April 15, 1957, at 2:00 o'clock P.M., defendants' counsel argued in State Court the question of injunction against the state officers.

19) On April 16, 1957, the trial commenced with defendants being forced to pick a jury from a panel which had just heard a twenty-four page discussion by the District Judge of the Restraining Order and some of the facts and testimony concerning the tape recordings which had been given by witnesses at the hearing on the motion to suppress (Tr. 11 to 14), despite defendants' timely request for a new panel which had not heard such remarks (Tr. 2 to 26, 26 to 28).

20) After a jury had been selected and sealed, the court then went into the discovery proceeding involving the listening to and making copies of the tapes upon which the government intended to rely at the time of the prosecution (Tr. 73-80).

21) April 18, 1957, the discovery proceedings were undertaken (time 11:45 P.M.) which lasted for a period of two days, through the 18th and 19th, the trial

itself commencing at 9:30 A.M., on Saturday, April 20, and continued on until 4:00 o'clock that afternoon (Tr. 100-232).

22) On April 21 after having prepared the lengthy and complicated documents necessary to apply to the Court of Appeals for the Ninth Circuit, for a Writ of Prohibition, counsel for defendants, flew to San Francisco from Portland and there argued the matter orally before the court.

ARGUMENT

It is respectfully submitted that none of the various motions and other preliminary matters were frivolous nor did they smack of delay. Indeed, it is submitted that the peculiar nature of this case affirmatively shows that each preliminary matter was serious and meritorious.

The motion to dismiss, for example, was lengthy and involved, simply because the wiretap statute, for purposes of criminal prosecutions thereunder, was and is a new statute, with few interpretive decisions construing it, thus making legal research on analogous principles lengthy and time consuming. The motion to suppress was lengthy and time consuming because defendants called sixteen witnesses, many hostile to defendants. Yet occupation of counsels' time in handling the preliminary motions and matters is just as effective in preventing any opportunity for preparation of the defense on the merits as would be absence from the state or other disability on the part of both defendants and their counsel.

The foregoing recital, alone, is so demonstrative of a denial of right to the effective assistance of counsel that it seems clearly to be a work of supererogation to argue the matter herein or to cite cases. But, briefly, we desire to call certain matters to this Court's attention.

It must be remembered that of a total of 60 days from arrest to trial, defendants each spent 25 days in Washington, D. C. actively assisting the government, which, through its legislative arm, was then commencing an important inquiry into racketeering and corruption in the labor and management field. Of the 13 days from arrest to leaving under subpoena for Washington, defendants were engaged "continuously" and their time was "completely occupied" with consultation, with staff members of the Attorney General's office and with the Grand jury. Of the 30 days between the time defendants returned from Washington, D. C. and the time of trial, four days were spent in court on the Motion to Suppress; portions of two other days were spent in court on other motions, and of the remaining 24 days, more than half were spent assisting the State of Oregon in its efforts to prosecute the indictments which arose out of the exposures by these two defendants (see M.C. 34-36, 39). Being forced to trial with such limited amount of time for consultation with attorneys and interviewing of witnesses simply does not constitute a fair opportunity to defend.

"Whether the time allowed counsel for a defendant for preparation for trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and

the pertinent facts, and the availability of material witnesses." *Ray v. U. S.*, 8 Cir. 1952, 197 F.2d 268.

It needs no citation for the rule that the granting or refusing of a continuance rests largely in the discretion of the trial court, but:

"The discretion of the court as to continuance is not absolute, however; . . . it should not be exercised arbitrarily or capriciously, nor in disregard of the fundamental rights of the accused; *it does not authorize the court to refuse a continuance when the circumstances disclose a condition of affairs showing that justice to accused entitles him to a postponement of his trial*, and a continuance should always be granted on a sufficient showing." (Emphasis supplied). 22 C.J.S. 471, Cr. Law, § 482.

It is respectfully submitted that it is a denial of a right to a fair trial and therefore a denial of due process, and a denial of effective right to counsel for the Court to have denied defendants' requests for a continuance. Defendants believe the Court's discretion in this matter was exercised "in disregard of the fundamental rights of the accused," and that justice and fair play call for a reversal on this ground.

With respect to the other basis for the motion to continue, namely, the damaging and prejudicial pre-trial publicity which was widespread in the Portland and Oregon area and also widespread throughout the United States, as is shown by the great and bulky exhibits of local papers and of nationwide news and picture magazines, such as *Time*, *Life* and *Newsweek*, it is clear that this case is nearly on all fours with the *Delaney* case, *Delaney v. U. S.* (1st Cir. 1952), 199 F.2d 107, in

which the conviction was reversed and the case was remanded for a new trial because of the failure of the trial court to grant a motion for continuance. In the Delaney case, the defendant was prosecuted for income tax violations allegedly committed by him as collector of internal revenue for the District of Massachusetts. He was suspended in June of 1951 for alleged irregularities in his office, removed from office by the President in July and on September 14, 1951, was indicted by the grand jury. At the time there was a congressional committee, the so-called King Committee, functioning and although Delaney's counsel sought to have the committee investigation of Delaney's matters postponed, this was unavailing, and on October 16, 1951, the King Committee commenced public hearings in Washington, D. C. focusing upon the alleged derelictions of the defendants. Many of the witnesses who had testified before the grand jury also testified before the committee. On November 15, the defendant filed a motion for a general continuance which was denied, the trial court setting the trial date for December 3, 1951 and then, on November 29, 1951, Delaney moved for a continuance for a "reasonable period of time" whereupon the court postponed the trial from December 3, 1951 to January 3, 1952. On January 3, 1952, the defendant moved for another continuance for a reasonable period of time which motion was denied and he was forced to trial and shortly thereafter was convicted. The First Circuit, in reversing upon this ground, had this to say:

"No doubt the district judge conscientiously did all he could, both in questions he addressed to the

jurors at the time of their selection and in cautionary remarks in his charge to the jury, to minimize the effect of this damaging publicity, and to insure that defendant's guilt or innocence would be determined solely on the basis of the evidence produced at the trial. But as stated by Mr. Justice Jackson, concurring, in *Krulewitch vs. U. S.*, 336 U.S. 440, 453, 93 L. Ed. 790: 'the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . and practicing lawyers know to be unmitigated fiction.' . . . One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his pre-conceptions as to probable guilt, engendered by a pervasive pre-trial publicity. This is particularly true in the determination of issues involving the credibility of witnesses."

A resort to the exhibits in the case at bar which were filed by defendants in support of their various motions for continuance, and particularly the shameful and reprehensible publications of one paper which continually harped upon alleged predelictions of defendants to narcotics and prostitution rackets, and in particular commenced an inflammatory daily series of articles about five days before the trial was to commence, shows clearly that the average juror was in no way able to exclude any unconscious influences of his pre-conception as to probable guilt engendered by this pervasive pre-trial publicity. It is submitted that the court committed reversible error in denying defendants' motions for continuance. As was said by the court in the *Delaney* case:

"This is not a case of pre-trial publicity of damaging material, tending to indicate the guilt of a defendant dug up by the initiative and private

enterprise of newspapers. Here the United States, through its legislative department, *by means of an open committee hearing held shortly before the trial of a pending indictment caused and stimulated this massive pre-trial publicity, on a nationwide scale. Some of this evidence was indicative of Delaney's guilt of the offenses charged in the indictment. Some of the damaging evidence would not be admissible at the forthcoming trial, because it related to alleged criminal derelictions and official misconduct outside the scope of the charges in the indictment.* None of the testimony of the witnesses heard at the committee hearing ran the gauntlet of defense cross examination. Nor was the published evidence tempered, challenged or minimized by evidence offered by the accused." (Emphasis supplied).

While this state of facts in the Delaney case is not precisely on all fours, we believe the similarity is readily apparent. As will be seen from the exhibits offered, the McClellan Committee held hearings on the Portland phase of its investigation from about February 25, 1957 to about March 14, 1957. Several witnesses before the committee, who had been accused by defendant Elkins in his testimony of racketeering or derelictions of duty, were extremely vicious and prejudicial in their responses and in their attempt to bring before the committee charges that defendant Elkins was connected with narcotics and prostitution, etc., all of which clearly were designed to smear Elkins before the public and the world. As will be seen from the exhibits, one of the newspapers in the Portland area did its best to give extremely wide currency to the allegations of alleged connections with narcotics and prostitution.

Consequently, as the court said in the Delaney case, at page 114:

"We think that the United States is put to a choice in this matter: if the United States through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time, the danger of the prejudice may reasonable be thought to have been substantially removed." (Emphasis supplied).

It is no answer either to suggest that merely because defendant Elkins in particular was thought by the committee to be a "favorable" witness, and even indeed, was described by Senate McClellan as performing a "patriotic duty" in his testimony before the committee, that the damaging effect of the prejudicial publicity was lessened. Even though there were elements to this widespread publicity which tended to react favorably upon defendant Elkins, there were equally widespread aspects to the publicity which was highly damaging and highly prejudicial. Among such was the litany of allegations accusing Elkins and Clark of connections with prostitution and narcotics. And, we suggest, merely because some of the publicity might be thought to have been favorable to the defendant would not remove from the juror's minds the harmful effects of the prejudicial publicity, nor would it permit an atmosphere in which the trial could be conducted so as to be truly free and

importial as to both parties—to permit fair play and due process of law to these defendants.

The only apparent solution would have been for the court to have granted such a continuance as would have been reasonable, and it is submitted that the defendants' requests were reasonable, the first being for a 90-days (from March 18, 1956) and the second for only a 30-days.

It is difficult to pinpoint, in the record, prejudice resulting from the Court's ruling. We can only point out that defendant Elkins' counsel was required to commence trial of this case on four days' notice during part of which time he was engaged in the preparation of the state court injunction suit and arguments thereon, and defendant Clark's attorneys were required to commence when they had been almost continuously engaged in the various motions and other preliminary matters. The Government's case required 29 witnesses and more than 60 exhibits were involved. Should an additional showing of prejudice be required in a case of this complexity?

We believe that the Delaney case is controlling in this respect, and that the lower court erred in failing to exercise its discretion by granting the defendants' motion for continuance, and for this reason we respectfully submit that the conviction should be reversed.

STATEMENT OF FACTS ON THE ASSIGNMENT OF ERRORS RELATING TO THE TRIAL

(All references herein are to page numbers of the Transcript of Proceedings, Volumes I to XV.)

After the jury was selected, the Court permitted defendants to employ a technician to make a copy of the tapes at the same time the tapes were being played for the Court. It was decided to hear them in camera on the first occasion and the F.B.I. agent made preliminary identification of the tapes (Tr. 104), and defendants and their counsel then heard the tapes for the first time. This commenced the afternoon of April 18th (Tr. 109-111) and continued with an evening session until 11:45 p.m., recessed until the morning of the 19th, and concluded at 5:15 p.m. April 19th (Tr. 158). The opening statement by the Government was made the following morning (Tr. 160), and defendants requested and were granted permission to reserve their opening statement until the close of the Government's case (Tr. 160, 161), and the testimony commenced.

The Government's testimony developed in the following manner, though not in the following order. F.B.I. agent Sherk identified Government's Exhibits 1 to 5 and the sub-lettered exhibits thereof as being the five reels of tape, their boxes, and the various slips of paper accompanying them, that were seized by him pursuant to the Federal search warrant at the First State Bank of Milwaukie (Tr. 165). He further testified that he had heard part of one of them the afternoon of May

22nd in the Multnomah County Sheriff's office (Tr. 180). Mr. Minielly, the Deputy Sheriff in charge of the raid on the Clark home, testified as to his finding five boxes (spools) of tape in a hassock at the Clark home, taking them down to the basement first where he initialed the boxes, then taking them out to his car where he locked them up, then delivering them to Sheriff Schrunk at the Sheriff's office in the County Court House (Tr. 579, 610). He explained the various discrepancies between his testimony and the receipt given by him the night of the raid and the return made into court, and explained about his "custody" of the tapes during the time they were going to the District Attorney's office, to the Grand Jury, to District Court, and back again (Tr. 629, 633). He also testified that as far as he knew they were missing for a period of from 12 to 24 hours (Tr. 736).

Terry Schrunk, the then Sheriff and present Mayor of the City of Portland, testified as to his receipt of the State search warrant, his delivering it to the Deputy outside the television station, and his later call to the scene of the raid after it was in progress. He explained his early morning listening to the tapes and his arranging for copies of *excerpts* of the tapes to be made (Tr. 902; but see 942 and 1883), by explaining that he wanted to "preserve the evidence" (Tr. 903) and that therefore these copies of excerpts were given to the newspapers reporters (Tr. 908).

Oscar Howlett, a deputy district attorney, testified as to his "custody" of the tapes during the time he

played them for the Grand Jury while the State court hearings on the motion to suppress was in progress (Tr. 1097, 1118).

The witness, Howard R. Lonergan, a member of the Bar and Chief Criminal Deputy under Mr. Langley, testified as to his custody of the tapes, and that when the witness Minielly was looking for the tapes and told him Judge Mears wanted them produced in court, that he "deliberately made a misstatement of fact" (Tr. 1167, 1187, 1188) to the witness Minielly, knowing that the witness Minielly was going to report it to the Court, to the effect that the tapes were not in the District Attorney's safe and could not be found, when in fact he, the witness Lonergan, saw them in the safe (Tr. 1188).

Claude Cross, a lieutenant in the State Police testified as to hearing the tapes and seeing them copied by Crosby (Tr. 1202-3) and to being present when the tapes were turned over to Sheriff Schrunk by the Attorney General, Mr. Thornton, pursuant to order of the District Court and as to the witness' subsequent placing of them in a safe deposit box in the bank at Milwaukie and that only he and Captain Gurdane had access to the box and he explained the circumstances surrounding his various entries into the box as did the witness Gurdane (Tr. 1244). Gurdane further testified as to the execution of the Federal search warrant (Tr. 1248). The witness Darby was a State policeman who also played the tapes while in the custody of the State Police (Tr. 1270). Mr. Franz from the First State Bank at Milwaukie testified as to the limited access to the

safe deposit box and that he was present when the F.B.I. executed its search warrant (Tr. 1822-5).

The witness Buell, a radio technician employed by the Oregon Journal radio station, handled one of the reels of tape on May 22nd when he spent about four hours untangling it (Tr. 1831-2).

Mr. Novak, a "disc jockey" was called by the Oregon Journal reporter, Brad Williams, to make copies of the tapes in the early morning hours of May 19th, the day after election day. That he made "about eight half-hour reels" (or a total of four hours of recordings) (Tr. 855) and left with the Journal reporter about 6:30 or 7:00 the next morning (Tr. 1854, 1857); that he made further copies of the copies at his radio station (Tr. 1860, 1861).

Charles Moore, another radio technician from the Oregon Journal radio station KPOJ, testified that in the late evening and early morning of May 17th-May 18th, he was directed to go to the Sheriff's office where he was met by two Journal reporters and that under direction of the Sheriff he made copies of excerpts of the tape (Tr. 1883).

The Government also called Dorothea Anderson, the secretary to the then District Attorney, Mr. Langley, who testified as to playing some of the tapes in the District Attorney's office.

All of the foregoing witnesses testified that there was no alteration made to the tapes while they were in the possession or custody of the witness so testifying.

Upon this chain of custody, the Government offered and the Court received Government's Exhibits 1 to 5 (the offer was renewed at Tr. 1903 and the exhibits were received at page 1937).

With respect to identifying the conversations, the Government called witness Maloney who identified numerous of the conversations, and Mrs. Anderson (Tr. 1289), former District Attorney Langley (Tr. 1494), and Thomas Sheridan, former Oregon Liquor Control Commission administrator (Tr. 1746), each of whom identified certain conversations as being telephone conversations in which the witness was a participant, and that they were actual telephone conversations, and in each instance the witnesses testified that they had not consented to the conversation's being intercepted, recorded, divulged or used by another.

With respect to the slips of paper constituting the sublettered Exhibits 1 to 5, the Government called Thelma McCulloch who identified defendant Clark's signature on certain bank records (Exhibits 22, 23 and 24) (Tr. 978), Harold Ennor, a license inspector for the City of Portland who identified Exhibit 25 as a license application in the name of Ray Clark, but could not identify the signature or other writing on the exhibit (Tr. 991); the witnesses Ross and Kelleher, who identified Government's Exhibits 26 and 27 as being business records from their taxicab concerns in the name of Raymond F. Clark, but who could not identify the signature or handwriting in the exhibits (Tr. 998, 1004).

The Government then called F.B.I. agent Durley B. Davis, a handwriting expert, qualified him, and, over defendants' objection, permitted the witness to give the opinion that the handwriting on the sub-lettered exhibits 1 to 5 (i.e., the slips found with the reels) was the same as that on the bank records, Exhibit 22, subletters (which had been identified and received), and with the license application and cab records (Government's Exhibits 24 to 27, inclusive, which had not been received in evidence) (Tr. 1013 to 1032), and thereafter received Exhibits 25, 26 and 27 into evidence (Tr. 1037). Mr. Davis then identified certain enlargements of the exhibits and explained his opinion to the jury stating positively that in his opinion the Government Exhibits 1 to 5, sublettered, i.e. the slips, were written by the same person who signed "Raymond F. Clark" on the bank records and the other records. (We parenthetically observe that if there was a proper foundation laid for Mr. Davis' testimony, in our opinion, it was sufficient to enable the jury to find that defendant Clark was the person who had written the slips found with Exhibits 1 to 5.)

With respect to "divulgence" and "use," the Government called three witnesses, the District Attorney, Mr. Langley, his wife, Janice Langley, and Clyde Crosby, an International Representative of the Teamsters Union. Mr. Langley testified that the defendant Elkins came to his house in late October, 1955 (with a gun in his pocket) and handed Langley what purported to be a typewritten transcript of certain telephone conversations and that on this typewritten transcript were certain of

those Langley had heard played during this particular trial and that Elkins then tried, by inference, to blackmail him for \$10,000 (Tr. 1418). That although Langley was then District Attorney he did not notify state or city police nor the sheriff, and that although he also knew the defendant Elkins was an ex-convict and that the carrying of a gun by him would have been an offense, that he made no effort to have him arrested (Tr. 1515-1516).

Mrs. Langley testified that on the occasion referred to by her husband she saw Mr. Elkins come in and hand her husband some papers and that her husband was mad or disgusted after Elkins left (Tr. 2393). She further testified that on the following day, a Monday, the defendant came to her house unannounced, walked in (when she opened the door) carrying a tape recorder, and played some tapes for her and then said that for \$10,000.00 he would leave the tapes for Mrs. Langley (Tr. 2397); that she recognized some of the conversations she heard on that day as being some of those heard in court; that on the recordings she heard a telephone bell, that it sounded like a "ting-a-ling-a-ling" rather than a "buzz-buzz" sound (Tr. 2439); that she saw no gun and that when she left the room Elkins left the house (Tr. 2443).

The witness Crosby testified that in the fall of 1955 Elkins brought out his tape recorder to Crosby's house and they retired to Crosby's basement where they spent several hours listening to tapes (Tr. 2179-2183) and that Elkins said the tapes were damaging to "Teamster officials" and that he, Elkins, had paid \$10,000.00 to

have them "burglarized" (Tr. 2183). The witness then listened to Government's Exhibits 1 to 5 and testified that there were approximately 11 of the conversations recorded thereon which he had heard in his basement on the day in question (Tr. 2187 to 2197).

The Court, over objection from defendants (Tr. 2199, 2200) (ruling at 2201), permitted the witness to testify to two other telephone conversations he heard in his basement, neither of which was recorded on Exhibits 1 to 5 (Tr. 2202) and a call from Maloney to Crosby (Tr. 2200). This was the Government's case on divulgence and use.

In addition to the foregoing witnesses, the Government called Bernard Kane who testified he had rented the two apartments involved at different times at the request of the defendant Elkins, and James Jenkins, who was named in one of the overt acts and who refused to testify on the ground of the privilege against self-incrimination (Tr. 2009). The Government also called Mr. Swank, a special agent for the telephone company who identified the toll records, or long distance calls, for Maloney's apartment in No. 502 King Towers—CApitol 8-1707, formerly ATwater 1707, and that the service records indicated that the phone was a hand set with a 25 foot cord and that usually a new instrument is installed each time there is a new tenant or customer (Tr. 2081). That the original installation was a telephone with a volume control on the bell and that the telephone lines in question connect to interstate lines (Tr. 2034); and that there was no record

of any complaints by Mr. Maloney about his phone (Tr. 2038).

The other witnesses called by the Government were Robert Carter and Alice Erickson, and we believe it is upon the testimony of these two witnesses (and the tapes themselves) that the Government relies for proof of "interception."

Carter was the manager of the King Tower Apartments and identified the occupancy records for apartments 502 and 503 (Tr. 1943 to 1946); that the two apartments have similar but reversed floor plans with a common kitchen wall and that in 502 there is an open archway between the kitchen and the living room (Tr. 1946, 1947). That after the articles first appeared in the Portland Oregonian in early 1956 he made an examination of Apartments 502 and 503 by removing the kitchen cabinets and that he found a hole about the size of a lead pencil just below the ceiling in the common kitchen wall between apartments 502 and 503 (Tr. 1947-1948) and that in the back of the back (or kitchen side) of the "stub wall" between the living room and kitchen of apartment 502 and about six feet from the floor, there was a hole scooped out in the plaster about the size of a teacup on the kitchen side, and on the living room side there was nothing left but the wall paper without 18 pin holes through it (Tr. 1958 to 1950). That Mr. Maloney (in Apt. 502) had his own unlisted telephone and that there was no switchboard in the apartment or rooms and that there was only one telephone in Mr. Ma-

loney's apartment and that the phone wires went down on the outside wall of the building (Tr. 1961, 1973) from the fifth floor (Tr. 1983); that a key to the basement telephone box had been given to law enforcement agencies (1987 to 1988), to-wit, the Portland Police Department (Tr. 1995, 1996).

Alice Erickson was a public stenographer in an office building in Portland and was employed by the defendant Elkins on the day of the occurrence concerning which she testified. Under Oregon law her testimony would have been privileged but the Court overruled defendants' objection on this ground (Tr. 2016 to 2018, 2045—the Court's ruling at 2051-2052). She testified that on November 18, 1956 (Tr. 2016) the defendants Elkins and Clark, a Mr. Dodd, an attorney from Seattle representing Joseph McLaughlin, and Mr. Hannon (a Portland attorney who formerly represented the defendant Elkins), whose condition was "not alert" and which caused the witness some concern (Tr. 2100, 2139), discussed the preparation of some "affidavits." Her testimony was long, and in the record quite confusing but in essence was that a form of affidavit (unsigned) was brought to her by Mr. Dodd (Tr. 2118, 2121) and some changes dictated into this form. She had a record of these changes but after it was completed neither Elkins nor Clark would sign it until there were some further changes made when it was signed, and that she had no recollection or record of these latter changes (Tr. 2122, 2132, 2142). That the phrases "telephone rings or telephone recordings" were used (Ex. 61 and 62, Tr. 2136) but it was

her impression that Elkins and Clark were talking about the sound of a telephone ringing "over here" and a wall microphone "picking up the sound" (Tr. 2144, 2166). The court overruled counsel's motion to strike this testimony (Tr. 2169-2171).

The only other testimony in the nature of an admission was Deputy Minielly's testimony that Clark, during the State search, said: "I hear you found GD tapes of Langley's," and that shortly thereafter, Journal reporter Williams asked Clark, "Did you make these tapes for Elkins?" to which Clark replied, "Yes, I did and you know it and that's why you are here." (Tr. 581, 582).

SPECIFICATION OF ERROR NO. 4

The Court below erred in giving its instruction of the terms "intercept," "intercepted" and "interception."

SPECIFICATION OF ERROR NO. 5

The Court below erred in refusing to give defendant Elkins' requested instruction on interception, Nos. 9 and 10.

SPECIFICATION OF ERROR NO. 6

The Court below erred in refusing to give defendant Clark's requested instructions on interception, No. 9.

SPECIFICATION OF ERROR NO. 7

The Court below erred in failing to grant defendants' motion to acquit in so far as the same was based upon the insufficiency of the evidence produced by the Government showing the fact of the "interception."

SPECIFICATION OF ERROR NO. 8

The Court below erred in denying defendants' motion renewing of a motion for acquittal at the close of the Government's case, based upon the same grounds as Specification No. 4 above.

SPECIFICATION OF ERROR NO. 9

The Court erred in denying defendants' motion for judgment and acquittal made after verdict, based upon the same grounds.

SPECIFICATION OF ERROR NO. 10

The Court below erred in failing to grant defendants' motion for a new trial based upon the same contentions.

These points were raised by (a) the defendants' motion to acquit (Tr. 2459, 2468) and their renewal of the motion to acquit at the close of the Government's case (Tr. 2490, 2491), (b) by their exception (Tr. 2533, 2534, 2528) to the Court's instruction defining "interception" (Tr. 2502). The Court's instruction, the defendants' exceptions and requested instructions on

this subject are all set forth in full (infra pp. 100 to 108), (c) by the defendants' motion for a new trial (Rec. 32, p. 118, 119), and (d) by objection to the receipt into evidence of Exhibits 1 to 5 (Tr. 1903 at 1904 and 1908, the Court's ruling at 1933 and 1934-1935).

Preliminary Statement

We are aware of this Court's Rule 18, 2. (d) relating to setting forth instructions. All of the foregoing seven assignments of error revolve around what we believe to have been the Court's and the Government's erroneous interpretation of the term "interception" and of the evidentiary requirements to establish an interception in violation of Section 605. For this reason we will discuss what we believe to have been the common thread of error which ran through and permeated the trial both with respect to the evidentiary requirements and the proper instructions on the term "interception." The instruction given by the Court and the defendants' requested instructions are all quoted in their entirety, infra, at pages 100, 103. We have taken the liberty of employing this form of presentation because we believe that this juxtaposition will clearly point out our contentions and reveal what we believe to have been the erroneous view of the Court below and of the Government concerning these questions.

ARGUMENT ON (a), (c) AND (d)

We believe the Court below was led into error by the Government in its reliance on the case of *United States*

v. Hill, 149 F. Supp. 83. The result was that the Court below took the position that the tapes themselves were evidence of interception, (Tr. 193, 194); that the tapes "speak for themselves" (Tr. 1933), and that the necessary element of interception existed if the conversation was overheard while it was in progress (Tr. 2502). In these respects, we believe the Court below erred.

With respect to the Supreme Court decisions, a chronological review suggests the following:

In the first *Nardone* case (302 U.S. 379, 82 L. Ed. 314), 1937, an evidence case, the Court held that direct taps to telephone wires was conduct proscribed by Section 605 and that evidence secured thereby was not admissible.

In the case of *Weiss v. The United States*, 308 U.S. 321, 84 L. Ed. 298, an evidence case, the Court followed *Nardone* and again held that evidence obtained from a direct wiretap was inadmissible notwithstanding the guilty pleas and consent extended at the time of trial by certain of the defendants.

In the case of *Goldman v. The U. S.*, 316 U.S. 129, 86 L. Ed. 1322, an evidence case, it appeared from the facts that Federal agents had fastened a microphone or listening device to the wall of a room adjoining that of defendants and had made a transcription of conversations taking place in the defendants' room. Part of the conversation consisted of defendant Shulman's talking into a telephone receiver, and the Court held that the overhearing and divulgence of what Shulman said into a telephone receiver was not a violation

of Section 605 (316 U.S. at 133). There the Court defined the term "interception" and specifically held (at page 133) that

"words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of Section 605,"

and again specifically stated that the listening in the next room to the words of Shulman as he talked into the telephone receiver was

"no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room."

Compare the instructions of the court below (Tr. 2503):

"So in determining and applying the meaning of the word 'interception,' or to intercept a wire communication, you are instructed that you must determine whether or not any telephone conversation, as we ordinarily understand the telephone conversation, was listened to or to what extent while it was being made or during the progress of conversation, either through instrumentalities of electrical devices or through the human ear, it was heard by another party. Now, that is one meaning of the word to intercept. . . ."

In the case of *On Lee v. The U. S.*, 343 U.S. 747, the Court held that the use by a "stool pigeon" of a small radio transmitter and microphone concealed on his person and the receipt of the radio messages by a narcotics agent did not constitute a violation of Section 605.

In the case of *Schwartz v. Texas*, 344 U.S. 199, 97 L. Ed. 231, the Supreme Court held that the use of an induction coil placed alongside the telephone and permitting the recording of telephone messages was not per se inadmissible under the rules of evidence of the State of Texas so as to prevent its use by a Texas court in a Texas state prosecution.

In the next case before the Supreme Court, *Benanti v. U. S.*, 355 U.S. 96, 2 L. Ed. 2d 126, an evidence case, the Supreme Court reversed a conviction based on evidence secured by a wiretap made by State officers. The Government sought to justify its position by showing that the State officers had authority by virtue of an ex parte State court order obtained under the New York wiretap statute to make the tap in question and that therefore the evidence should have been admissible. The Supreme Court held that the Federal statute preempted the field and that therefore the State statute could not give authority for the prohibited conduct of wiretapping, and reversed the conviction.

In the case of *Rathbun v. The United States*, decided the same day, 355 U.S. 111, 2 L. Ed. 2d 137, the Supreme Court affirmed a federal court conviction for transmitting a threat in interstate communication, the evidence of which was based upon a police officer listening to a conversation between defendant and complaining witness by means of an extension telephone in the complaining witness' home. The Supreme Court noted the divergence of opinion among the circuits as to what constitutes an "unauthorized interception" within the

meaning of 605 and held that listening on an extension telephone did not constitute an interception within the meaning of Section 605. (We should note that although the Chief Justice did not place the lack of "interception" specifically on the ground of consent, it seems implicit that he was discussing a situation where one of the parties to the conversation had consented to the overhearing.)

The sum total of the Government's case on interception was that the Government's exhibits were found in Clark's possession, that they were recordings of actual telephone conversations, and that the parties to the telephone conversations did not consent to such being "intercepted" or recorded. That there was a hole in the wall about six feet above the ground above the place where the telephone frequently sat and a hole between the two apartments; and that, according to Mrs. Erickson, there was a discussion by defendants of tapes concerning "telephone rings or telephone recordings" which she understood were made by the sound of the telephone "over here" and a wall microphone picking up the sound.

We respectfully submit that there was insufficient evidence of "lines intercepting the telephone wires" of Maloney as set forth in paragraph numbered II, Count I of the indictment (Record No. 3, page 11) nor was there any other evidence of an interception as that term has been defined by the Supreme Court and that therefore the various motions directed to this point should have been granted.

(b) (Instructions)

This point was also raised by the exception to the Court's instruction on interception and the exception to the Court's failure to give the defendants' requested instructions on "interception."

The Court instructed the jury as follows (Tr. 2502-2504):

"You will notice that the law read to you and the courts in the indictment use the word 'interception.' You are instructed that this word as used in the statute has a definite meaning. Members of the jury, our Supreme Court has defined the term 'intercepted' as a portion of the wiretapping statute referred to to mean the taking or seizure by way or before arrival at the destined place. Therefore, in order to constitute the interception of a communication by wire as the Government contends in the various counts of the indictment you must be satisfied beyond a reasonable doubt that the communication by wire was taken or seized by the way or before that communication by wire arrived at the destined place. In other words, the taking or seizure of a telephone conversation to constitute an interception under the statute and under the indictment must occur while the communication is being made upon the telephone system.

"The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation. What is protected and is intended to be protected by the statute is the message itself during the course of transmission by the instrumentality or agency of transmission. So, members of the jury, this meaning and interpretation of the word interception must be considered by you in the light of ordinary common knowledge.

"One use of an 'interception' would mean to

deprive a person from it; for example, the interception of a football pass made during the time of flight; in other words, preventing its ultimate receipt or arrival at a certain destination.

"It is not the contention of the Government in this case that any one of the conversations which it claimed were intercepted, that the receiver thereof did not receive the message. So, in determining and applying the meaning of the word interception, or to intercept a wire communication, you are instructed that you must determine whether or not any telephone conversation, as we ordinarily understand the telephone conversation, was listened to or to what extent while it was being made or during the progress of the conversation, either through instrumentalities of electrical devices or through the human ear, it was heard by another party. Now, that is one meaning of the word to intercept. So, in considering the evidence bear in mind that it is not claimed that any telephone message here was intercepted to the extent that it was not received, but it is claimed in ordinary parlance by the Government that the telephone conversations it claimed actually happened were listened to by other persons and, as alleged, the defendants, through a listening device." (Tr. Vol. XV, pp. 2502-2504).

To the giving of this instruction and the failure to give the defendants' requested instructions, defendants' counsel except as follows (Tr. 2531):

"MR. CRAWFORD: Then, we respectfully except to the giving of the Court's instruction upon the definition of interception. Up to a point we believe that the Court correctly stated the law. Then we believe the Court erred in that respect the same way that if it had taken the analogy offered by the—Mr. Evans in his argument for Mr. Elkins. And, for the further reason, that we believe such an analogy is not correct, is in direct conflict with *United States vs. Goldman*."

And at page 2533, the defendants Elkins took his exceptions,—Mr. Evans speaking:

“ . . . We except to the Court's employing the analogy of the football pass on the ground that, in the first place, that is improper, I think, for the Court to make an analogy from one of the arguments when that particular analogy happens to have been employed by one of the counsel. More important even than that, was the Court's—what we believe to have been the Court's error in its definition of the word 'interception.' I am not able to fix the precise point, but I am under the impression that the Court read for a while, then after reading from the printed material the Court discussed—and I can't recall the exact words but something to the effect of overhearing a telephone conversation or what was protected was the conversation itself. And, in any event, the Court has in mind, I think, what I am referring to. And we specifically state that at that point the Court deviated from its former instruction and actually was contrary to the law as laid down by *Goldman vs. the U. S.* which is the latest Supreme Court case on that subject.

“There is no particular contention made at any time in this case of an interception meaning a deprivation from the defendant and the effect of the Court's instruction is, as we see it, to leave the matter wide open as to the overhearing of a conversation in a room which conversation was being put onto the telephone wires by the party who was making the conversation.”

The defendant Elkins requested the following instructions on interception:

"No. 9

"You will notice, Ladies and Gentlemen, that the statute used the term 'intercept' and I will now instruct you as to the meaning of this term as it applies to this statute and to the indictment upon which this prosecution is based.

"The term 'intercept' indicates or means the taking or seizure by the way, that is the taking in between two points, and it necessarily must mean taking before the arrival at the destined place. It does not mean the obtaining of what is sent before or at the moment it leaves the possession of the proposed sender, nor does it mean the obtaining of what is to be sent after or at the moment it comes into the possession of the intended receiver. For example, if a person is sitting in a room and another person in that room picks up a telephone, dials a number, makes a connection with the person on the other end with which he wishes to talk and the person who is sitting in the room overhears the conversation or the words spoken by the person who initiated the telephone call, such would not be an interception of the telephone or wire communication within the meaning of this statute. Similarly, if a person places a microphone or other instrument or device in the room or in the wall of the room in such a manner that the sounds of the person's voice as he speaks into the telephone are picked up and may be heard by a listener in an adjoining room, by use of such microphone or even are recorded on a recording machine connected to the microphone, such would not be an interception of a wire communication within the meaning of the statute. Now the Government has charged in the various counts of this indictment that the defendants Elkins and Clark intercepted certain wire communications as will be more fully described to you in the later portions of my instructions, and in order for you to find that defendants Elkins and Clark inter-

cepted such wire communications as alleged in any of the various counts of indictment, you must be satisfied beyond a reasonable doubt that the communications were taken ahold of, or seized, *after* the communication or sounds entered the telephone system and before the time that they left the telephone system at the other end of the wire. In other words, it must have been a wire communication that was intercepted. If there is a reasonable doubt in your minds that all or any of the conversations which have been played to you on the tape recordings here did result from an interception, as I have defined it to you, then you must return a verdict of not guilty as to these defendants as to all such counts on which you so find there exists a reasonable doubt as to such interception. Of course, before you could find the defendants guilty as to any of the counts you must not only find beyond a reasonable doubt that there was an interception as I have defined it to you, but also that the other material elements have been proved to your satisfaction beyond a reasonable doubt." (Transcript of Record, Volume I, pp. 190-192).

"No. 10

"Ladies and Gentlemen of the Jury, I have already read to you the provisions of Sec. 605, of Title 47, U.S.C., which is known generally as the 'wire tapping' statute, and which is, of course, the statute under which this indictment is brought. You will notice that both the statute and the indictment use the word 'interception' and I instruct you that this word, as used in this statute, and in this indictment, has a definite meaning, as a matter of law. I shall now define the term 'interception' to you and I instruct you that you must find, beyond a reasonable doubt, that an interception occurred, as well as the other material elements of each count of the indictment, before you would be authorized to return a verdict of guilty as to any such count of this indictment.

"That is, if the facts as you find them do not constitute an 'interception,' as I shall define it, then, no matter what your own view may be as to the facts in this case, you must return a verdict of not guilty as to Counts 2, 5, 6, 7, 8, and 9, regardless of what you may think of the conduct of the defendants with respect to the making of tape recordings.

"Now, Ladies and Gentlemen, our United States Supreme Court has defined the term 'intercept,' as a portion of the 'wiretapping' statute, to mean the *taking or seizure by the way or before arrival at the destined place,*' and therefore, in order to constitute the interception of a communication by wire, as the Government has charged in this indictment, you must be satisfied beyond a reasonable doubt that the communication by wire was taken or seized by the way or before that communication by wire arrived at the destined place. In other words, the taking or seizure of a telephone communication, to constitute an interception under the statute, and under the indictment, must occur after the communication enters or embarks upon the telephone system, and before it has left that system. This is so, because (as the Supreme Court has said, in the case of *Goldman v. U.S.*, 316 U.S. 129, 86 L. Ed. 1322) the protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation. What is protected, and is intended to be protected by the statute is *the message itself* throughout the course of its transmission by the instrumentality or agency of transmission. For example, although we are dealing in this case solely with a question of whether or not these defendants intercepted telephone communications, words written by a person and intended ultimately to be carried, as written, to a telegraph office, do not constitute a communication within the meaning of the Statute until they are handed to an agent of the telegraph company. Likewise, with respect to a telephone communica-

tion, words spoken in a room in the presence of another into a telephone receiver do not constitute a wire communication within the meaning of the statute. Therefore, the listening in the next room by one, to the words of a person in the adjoining room which are spoken into a telephone instrument, does not in and of itself, constitute an interception of a wire communication within the meaning of the statute." (Transcript of Record, Volume I, pp. 192-194).

Defendant Clark's requested instruction:

"No. 9

"Now, you will recall that I have, a short time ago, defined an interception as the taking or seizure by the way or before arrival at the destined place. By contrast, I instruct you that it is *not* an interception to obtain, either by listening, or recording on tape, words that are to be sent, before, or at the moment those words leave the lips of the sender. Nor is it an interception to obtain the words of the party on the other end of the line after, or at the moment they come into the ear of the intended receiver.

"Now, Ladies and Gentlemen of the Jury, I shall give you several examples of what are and what are not interceptions of telephone communications within the meaning of the statute. Of course, if a person attaches wires to the telephone wire connecting two parties together, and the person who attached the wires was thereby able to obtain the conversation passing over the telephone line, I instruct you that such would be an interception, within the meaning of the statute. On the other hand, if a person had a microphone in the wall near a telephone instrument, and this microphone was utilized so as to permit another person to overhear, or even record the words of the person who was using the telephone instrument, by virtue of the fact that what the microphone was picking up was the words

spoken by the telephoner before, or at the moment they were leaving the lips of the sender and before they entered the telephone system, such overhearing of the conversation would not be an interception of a telephone communication within the meaning of the statute and indictment we are concerned with here.

"I further instruct you that if this microphone in the wall was powerful enough not only to permit the overhearing, or even recordation of the words of the person speaking into the phone in the room in question, but also powerful enough to permit the overhearing, or even recordation of the words of the person on the other end of the line, by virtue of the fact that what was being overheard and recorded were the words of the person in the room *before* they entered the telephone system, and by virtue of the further fact that the words of the person on the other end of the line were being overheard and recorded *after* they had left the telephone system, such would not be an interception within the meaning of the statute.

"Now, in light of the definition of the term 'interception,' as I have just defined it to you, I further instruct you that the Government has charged in this case, with respect to Count I, the conspiracy count, that the interception occurred by virtue of a recording device being connected to lines intercepting the telephone wires of Thomas Maloney's phone in apartment 502 of the King Tower Apartments, and consequently, before you can return a verdict of guilty as to the defendants, or either of them, on Count I, you must be satisfied beyond a reasonable doubt that the defendants conspired to intercept telephone communications in that manner. Of course, you would have also to find beyond a reasonable doubt the other material elements of Count I, as I have or shall define them to you.

"With respect to Counts 2, 5, 6, 7, 8 and 9,

since each count charged the defendants, and each of them, with an interception of a wire communication, before you would be able to find an interception, you must be satisfied beyond a reasonable doubt, as to each Count, that the recordings did not result from the existence of a wall microphone which was powerful enough withother attachments not intercepting Maloney's telephone wires to permit the overhearing and recordation of the telephone conversations referred to in the indictment. You must be satisfied, beyond a reasonable doubt, that the overhearing and recordation, if any, of the telephone conversations claimed by the Government resulted from the intercepting of the wires of the telephone of Thomas E. Maloney, or from other interception of the message, during the time that the message or conversation was in the 'course of transmission' by and over the telephone system itself. Overhearing and recordation of the conversations which occurred at any time other than while the conversation was in the course of transmission would not be an interception. And I therefore instruct you that if you find that any overhearing and/or recordation, done or performed by these defendants, or either of them, occurred at any time other than during the course of transmission over the telephone system, then you must return a verdict of not guilty as to the defendants, and each of them, as to Counts 2, 5, 6, 7, 8, and 9." (Transcript of Record, Volume 1, pp. 177-180).

ARGUMENT ON (b) (Instructions)

It is our position that the Court's instruction completely lost sight of the distinction between eavesdropping and intercepting a wire communication.

We ask the Court to consider the Court's instruction on interception:

"So . . . you must determine whether or not any telephone conversation as we ordinarily understand

the (term) telephone conversation, was *listened to* or to what extent while it was being made or during the progress of the conversation either (through) instrumentalities of electrical devices *or through the human ear*, it was heard by another party. Now that is one meaning of the word to intercept. . . ." (Emphasis and parenthetical added).

Then consider the admonition given by the Court immediately thereafter (Tr. bottom of page 503):

. . . Bear in mind that it is not claimed that any telephone message here was intercepted to the extent that it was not received, but it is claimed in ordinary parlance by the Government that the telephone conversations it claimed actually happened were listened to by other persons and, as alleged, the defendants, through a recording device."

We submit that the Court below has confused the element of "consent" with that of "interception" (and in all fairness we must admit other courts have done the same). The statute makes it an offense (1) to intercept, (2) without the consent, etc., but we submit that the two are entirely separate. Interception must mean "taken by the way" as defined by the Supreme Court and we believe that discussions as to the relative speed of sound and electricity do not advance the cause of logic. We urge that the correct interpretation in view of the Supreme Court decisions, and indeed the only common sense definition of an interception, is that which interferes with the integrity of the telephone system and we invite the Government to point out any evidence in this case to indicate such an "interception."

The Court, in admitting the evidence, stated that the tapes "speak for themselves" (Tr. 1933). It is true that

the tapes reproduce voices, but they reproduce nothing as to the manner in which the recordings were secured. If the tapes "speak for themselves," it would seem to us to be mandatory to reverse this decision on this ground alone, for the reason that the tapes are equally consistent with the hypothesis that they were made under lawful circumstances through lawful means (assuming the *Goldman* case to still be the law). We trust the Court will take judicial notice of the laws of physics, that sound waves travel and can be picked up by either the human ear or a microphone.

To argue, as did the Government, one must start with the premise that these tapes found in Clark's possession contained recorded telephone conversations (and we assume for purposes of this argument that such was the fact). The participants to the conversations state they did not consent to its being intercepted or recorded. The Government introduced "admissions" allegedly made by Clark that he made the tapes for the defendant Elkins, and (from Mrs. Erickson, the public stenographer) to the effect that Clark made recordings for Elkins and that they were made with a wall microphone and picked up "telephone rings or recordings." Is this evidence of interception? There is no crime to possess recorded telephone conversations. The crime is unlawfully intercepting and divulging, or using them after acquiring knowledge that they were unlawfully intercepted. Perhaps we belabor the point but the charge found in paragraph 2 of Count 1 of the indictment was (Rec. No. 3, page 11): that this recording device would be connected to *lines intercepting the tele-*

phone wires of Thomas E. Maloney, etc.” The Court permitted this case to go to the jury against each of these defendants without any evidence of interception except that gained by an inference upon an inference. If we infer from the lack of consent that the recording was unlawful and if we infer from the lack of knowledge and the hole between the two apartments that the recording took place in another room, then we could perhaps infer that it took place while the telephone was being used. We are at a loss to see how one can infer that there was an interception of a wire communication as distinguished from a mechanical eavesdropping on an oral conversation. We are aware of the fact that the Government will no doubt point out the change in volume of the background noise and the fact that sometimes the bells have a ringing sound and other times a buzzing sound, that in one or two of the conversations (relied on to support the two counts which were dismissed), one could hear an operator reporting on the call, etc. We still respectfully suggest that this does not aid the cause of “interception.”

Let us apply a backwards test—if the evidence in this case is sufficient to support an indictment for a violation of § 605, would not any such indictment and conviction be sustained by proof that one had played a recording of a telephone conversation made without the consent of the parties, and regardless of how the defendant came into possession of the recording? If this is the law, we respectfully suggest that judicial construction has been substituted for one of the elements of the offense—namely interception.

SPECIFICATION OF ERROR NO. 11

The Court erred in using the football analogy in its instruction to the jury when the same had been employed by counsel for the Government in his closing argument in the jury.

The Court instructed the jury in dealing with the subject of interception (Tr. 2503):

“One use of an ‘interception’ would mean to deprive a person from it; for example, the interception of a football pass made during the time of the flight; in other words, preventing its ultimate receipt or arrival at a certain destination.”

In the Government’s argument to the jury at the close of the case, Mr. Luckey argued in part as follows (Stipulation for Supplementing Transcript, attached to Volume XV of the Transcript of Proceedings):

“But, with reference to interception, a homely example might well be the football player who throws a pass to the end and the end fumbles but it goes on beyond the end and someone, in the language of the announcer, intercepts that pass. I suggest to you that certainly in common understanding we are not obligated to prove more than that these telephone conversations were obtained by a third person unknown to the senders or the parties to the conversation. And, that was clearly done.”

The Court’s instruction was excepted to by counsel for defendants as follows (Tr. 2531):

“MR. CRAWFORD: . . . Then we believe the Court erred when the Court referred to the analogy of the football pass as advanced by the State. We believe the Court erred in that respect the same way that if it had taken the analogy offered

by the—Mr. Evans in his argument for Mr. Elkins. And, for the further reason, that we believe such an analogy is not correct, is in direct conflict with *United States vs. Goldman*.”

And at page 2533, the defendant Elkins excepted in the following manner:

“MR. EVANS: . . . We except to the Court’s employing the analogy of the football pass on the ground that, in the first place, that is improper, I think, for the Court to make an analogy from one of the arguments when that particular analogy happens to have been employed by one of the counsel. More important even than that, was the Court’s—what we believe to have been the Court’s error in its definition of the word ‘interception.’ etc.”

ARGUMENT

At the outset we wish to make it clear that we believe the Court’s using the same analogy as that employed by Mr. Luckey was inadvertent in that the Court did not have in mind the fact that Mr. Luckey had employed it in his argument. We respectfully suggest, however, that notwithstanding the innocence of the Court in employing this analogy, the damage was done. We do not believe that it requires a “refined calculus” to determine the effect on the jury of hearing an argument made by one of counsel employing a “homely example” and then to have the same “homely example” repeated to them in the course of the Court’s instructions. Further than that, we think the unintentional but inevitable effect of this was to point up what we conceive to be the gross error of the Government’s position, that with reference to interception “we are

not obliged to prove more than that these telephone conversations were obtained by a third person unknown to the senders or the parties to the conversation"! (Compare this with the language of Mr. Justice Roberts in the majority opinion in the *Goldman* case (316 U.S. 129, *supra*, at page 97)).

SPECIFICATION OF ERROR NO. 12

The Court below erred in compelling Government witnesses Minielly, Schrunk, Howlett, Lonergan, Cross, Gurdane, Darby and Langley to testify in violation of the terms of the State court restraining order.

This question was raised by objection, first, to the testimony of Mr. Minielly (Tr. 569-571). Similar objections by counsel and directions by the Court were given to each of the above named witnesses—Schrunk (Tr. 801, Howlett (Tr. 1090-1094), Lonergan (Tr. 1145-1149, 1152, 1155, 1157, 1158); Cross (Tr. 197); Darby (Tr. 1266); and Langley (Tr. 1389). In each of these cases the Court ordered the witness to testify under penalty of contempt under the theory that he supremacy clause of the United States Constitution (M.C. 50, Tr. 25) and lack of jurisdiction in the Circuit Court (Tr. 37) based on 73 U.S. 166, *Riggs v. Johnson County* (Tr. 37).

ARGUMENT

Appellants contend that the action of the trial court in compelling the witnesses above name to testify concerning the State search and seizure (and in admitting Government's Exhibits 1 to 5 and the sublettered exhibits) violated the appellants' rights under the fourth and fifth amendments of the United States Constitution.

Appellants contend that, regardless of the question of whether or not illegally seized state evidence is admissible in a federal prosecution (cf. *Hanna v. The U. S.*, U.S. Court of Appeals D.C. Circuit, decided October 2, 1958), the action of the court below, under the doctrines of *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1782, and *U. S. v. Rea*, 350 U.S. 314, 100 L. Ed. 233, deprived defendants of their right of due process and subjected them to unreasonable search and seizure, since it denied to appellants their right of state "due process."

When the State Court, through the injunction suit, sought to redress the wrong perpetrated by the illegal State search warrant, we submit it was acting within its legitimate jurisdictional sphere. Did not the order of the court compelling these witnesses to testify, in effect, advise the State court that it had no right to follow the Weeks' doctrine? *Weeks v. The U. S.* (232 U.S. 383). If this is permissible, of what value is the Fourth Amendment protecting against unreasonable search and seizure by the Federal Government or the Fifth Amendment guaranteeing due process in the Federal courts? The defendants cannot complain under the Fourteenth Amendment because the State court not only agreed

with them but did its best to protect them from the consequences of an illegal State search and seizure. Its precedent in so doing was the *Rea* case, *supra*. We suggest that the case cited to the lower court by the Government (M.C. 51) and relied on by the District Court (Tr. 37), *Riggs v. Johnson County*, 73 U.S. 166 at 196, 18 L. Ed. 768, at 776, is, in fact, authority for the appellants' position. If the Federal Government cannot, by its Marshals, seize property held by the State Court subject to a State Court execution, can the Federal Court by threat of contempt compel State officers to testify in violation of a State Court restraining order simply because they have been served with a Federal subpoena? We respectfully submit that the State Court was not in any way trying to interfere with the Federal Court's conduct of the trial nor to restrain the Federal Court's prosecution of this offense. It simply said to its State officers, "You shall not be permitted to violate the policy of the State of Oregon by testifying as to what you learned on the night of the illegal search."

Justice Frankfurter, in the *Wolf* case, stated (338 U.S. at 28):

"Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy, it would run counter to the guarantee of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. . . ."

And again at page 31 (speaking of the states which did not follow the *Weeks*' doctrine but relied on other means of protecting the right of privacy):

" . . . Granting that in practice the exclusion of

evidence may be an effective way of deterring unreasonable searches, it is not for this court to condemn as falling below the *minimal* standards assured by the due process clause a state's reliance upon other methods which it consistently enforced, would be equally effective." (Emphasis added).

If the question before the Supreme Court was whether or not a State might adopt a substitute for the Weeks' doctrine without running afoul of the Fourteenth Amendment, can there be any question concerning a State's right to enforce the Weeks' doctrine? If so, did not the lower court in this case deprive the defendants of due process under the Fifth Amendment, and subject them to an unreasonable search and seizure under the Fourth Amendment, by failing to recognize the State's doctrine and accepting (or even picking?) the "fruit" of the illegal search?

The Federal Court here, by compelling the State officers to testify in violation of the restraining order, in effect, was "affirmatively to sanction such police incursion into privacy" as would "run counter to the guarantee" of the Fourth and Fifth Amendments. The Federal Court said, in effect, we will not allow you to implement your policy toward errant State officers, even though that policy is the same as is the Federal policy toward errant Federal officers. *Rea v. U. S.*, *supra*.

SPECIFICATION OF ERROR NO. 13

The Court erred in admitting Exhibits 1 to 5 and sub-lettered exhibits into evidence generally and in failing to give the identical instructions requested by each defendant (Defendant Clark's requested in struction No. 10—Transcript of Record, pp. 180-181, and Defendant Elkins' requested instruction No. 28—Transcript of Record, pp. 220-222).

ARGUMENT

(a) *Their receipt into evidence.* The Government had offered Exhibits 1 to 5 on a number of occasions, each time the defendants had objected that insufficient evidence to establish the chain of custody had been offered and finally (Tr. 1902) Mr. Luckey stated:

“ . . . I would like to, however, get the matter disposed of with reference to the reception of this evidence.”

To which defendant objected (Tr. 1903):

“MR. EVANS: Now, at this time, Your Honor, we would object to receipt into evidence of Government's Exhibits 1 to 5 which, I understand, are the reels of tapes, for the reason . . . first, that there has been insufficient identification; second, that there is insufficient evidence of the chain of custody; third, that even in and of themselves they do not constitute evidence of a corpus delicti; although I am frank to concede they might be one element if properly coupled up or identified with other testimony; fourth, that there has been no connection shown here between those exhibits and my client, the defendant James Butler Elkins or for that matter with either of them; fifth, the fact

that it now appears—I say now. Perhaps I should say that we renew our objections to their receipt on the grounds that they are the fruits of an illegal search and seizure.”

and the matter was then argued (Tr. 1904-1909) at which point the defendant Clark joined in the objections and argued (Tr. 1909-1923). The Government answered the argument, counsel replied, and at page 1932 the Court commenced its ruling dealing with the chain of custody at page 1935, and overruling the objections at page 1936.

We will not belabor this point here. We readily concede that it is discretionary with the trial court as to what amount of identification must be required before the tapes or any exhibit can be admitted before the jury in a criminal case. We suggest that the Court below erred in exercising such discretion in view of the peculiar circumstances of this case; the making of many copies, the possession of the tapes by parties referred to therein, and the complete lack of any normal semblance of routine police practices in marking and identifying exhibits, and the absence, as a witness, of the ubiquitous Mr. Williams, Journal reporter who had the initial conversation with Mr. Herder, who was present on the raid, and who asked the fortuitous question, “Did you make these tapes for Elkins?” He was not called as a witness although present at the beginning of the trial and at defendants’ request excluded from the Court room (Tr. 161, 162).

(b) *The instructions.* Assuming, however, that the Court did not abuse its discretion in admitting the

tapes, was it not error to fail to give the following cautionary instructions requested by each defendant?

"I instruct you, Ladies and Gentlemen of the jury, that there has been introduced into evidence herein certain reels and certain tapes known as Government's Exhibits 1 to 5 inclusive. It is upon the verity and proper identification of these reels and tapes that the Government's case rests.

"Before their admission into evidence, the Government was not required to prove in order to admit the said exhibits that every possibility of mistaken identity be excluded but only that it was probable that the said reels and tapes were properly identified. However, once that the said reels and tapes had been admitted into evidence and the question arises as to their verity, genuineness and authenticity, it then becomes incumbent upon the Government to prove by competent, substantial evidence which convinces you beyond a reasonable doubt that the chain of custody, that is, all the various circumstances, places and persons who had anything to do with the custody of the said reels and tapes is completely unbroken or satisfactorily explained from the time that they were first obtained, if you find that they were obtained from the defendants, until the time that they were introduced as evidence herein. This is what is known as the chain of custody, and I instruct you that if you find that if one link in the chain is entirely missing, the chain of custody is not complete. Evidence other than the persons having custody of the said reels and tapes is not sufficient to supply missing links in the chain. This is especially true if there has been intermeddling by persons not called as witnesses in this case who had anything to do with the custody of the tapes and reels, or if the circumstances surrounding the preservation and custody of the reels and tapes were of a suspicious nature, so I instruct you that before you can find that Government's Exhibits 1 to 5 inclusive, constituting

the said reels and tapes, were actually in the possession of the defendant in the same condition as they were introduced in the Court herein, it is necessary that the chain of custody and each and every link thereof be entirely supplied and accounted for by the Government by evidence which convinces you beyond a reasonable doubt that they were, in fact, the identical tapes in the same condition which the Government claims were found in the home of the defendant Clark on May 17, 1956." (Rec. pp. 180, 220. Clark's Request No. 10, Elkins' Request No. 28).

The failure to so instruct was specifically excepted to by each defendant (Tr. 2528, 2533). The Court did give cautionary instructions with respect to "oral admissions" (Tr. 2517, 2518), "circumstantial evidence" (Tr. 2519-2520), "burden of proof" and presumption of innocence (Tr. 2520, 2495), but gave no instruction touching upon the subject matter referred to in the requested instructions. We believe the instruction correctly states the law and that on the cross-examination of the Government's witnesses beginning with the Mayor and Sheriff, Mr. Schunk, his testimony concerning the making of the copies, the complete lack of any identification mark on the tape itself that a question arose as to the verity, genuineness and authenticity of the tapes, and we believe that the requested instruction should have been given. *U. S. v. Penick Co.*, 136 F.2d 413.

SPECIFICATION OF ERROR NO. 14

The Court below erred in failing to allow specification VI of defendants' motion to dismiss the indictment (Tr. of Rec. No. 11 at page 43 in Court's opinion thereon Tr. of Rec. No. 18, page 74 at page 79), and failing to allow defendants' motion in arrest of judgment.

On March 19, 1957, defendants moved to dismiss the indictment for the reason, among other grounds, that Counts II, V, VI, VII and IX failed to refer to or allege interstate commerce. The Court's written opinion is found at page 79 of the Transcript of Record.

After verdict, defendants moved in arrest of judgment (Record No. 33, pp. 121-126) and the various points raised thereunder have been discussed elsewhere in this brief except the following:

"2. Each count of the indictment fails to state an offense over which this Court has jurisdiction in that each count fails to allege any interception of a communication by wire which was then and there being carried over or transmitted by a facility, instrumentality or apparatus which was part of a system of wire communication in interstate commerce."

We call the Court's attention to the fact that on defendants' cross-examination of Mr. Swank, it appeared that Thomas Maloney's telephone was connected to an interstate system (Tr. 2034). We also call the Court's attention to the fact that Counts 3 and 4, which were dismissed, referred to conversations between Oregon and Washington and also that Count 8,

upon which the defendants stand convicted, charges the defendants with intercepting a wire communication between "Thomas E. Maloney, in Portland, Oregon, and Joseph McLaughlin in Seattle, Washington" etc. (Tr. of Rec. No. 3 at page 20).

ARGUMENT

Other than noted above, the indictment is silent as to any charge or suggestion that the messages involved were in any way moving over interstate facilities or on intrastate facilities used also for interstate transmission of messages.

We believe this is a fatal error as to all counts. Although Count VIII alleged defendants "did unlawfully intercept . . . a wire communication between . . . Maloney, in Portland, Oregon and . . . McLaughlin in Seattle, Washington" and thus might inferentially charge interception of an interstate message, compare it with the language of one of the dismissed counts, Count III: "did intercept . . . a wire communication between . . . Maloney, *communicating from the State and District of Oregon, to . . . McLaughlin in Seattle, in the State of Washington, the same being an interstate communication by wire, . . .*" (Rec. No. 3, page 15). Neither Count III nor Count VIII can aid the rest of the indictment, as each count must stand alone, and each of the remainder are insufficient.

" . . . Jurisdiction cannot be presumed in any court, even in preliminary stages, or has any federal court ever held to the contrary". (*U. S. v. Chiarito*, 69 F. Supp. 317).

By analogy from the Dyer Act cases, we note the requirements of *Cox v. The U. S.*, 96 F.2d 41 (8th Cir. 1938), *Davidson v. The U. S.*, 61 F.2d 250, and the earlier cases cited therein, reversing convictions under the Dyer Act when the evidence (and in the Davidson case the indictment) negated any inference that the car was a part of interstate commerce at the time it was either received or was sold.

Congress has no jurisdiction over telephone messages unless they are either in or affect interstate commerce, or are being transmitted on a system which is a part of the instrumentalities used in interstate commerce. See *U. S. v. Polakoff*, 112 F.2d 888; *McGuire v. Amrein*, 101 F. Supp. 414, holding that the Federal Courts have jurisdiction of an offense under the wire-tapping statute as to intrastate telephone communications. In reaching this conclusion they rely on *Weiss v. The U. S.*, 308 U.S. 321, 84 L. Ed. 298, where the Supreme Court said:

“We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence.”

We suggest that this statement should be read with the earlier statement of Justice Roberts (at p. 327):

“And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications.”

The case of *U. S. v. Gris*, 146 F. Supp. 293, would appear to be contrary to the position being urged here. In that case there was no allegation in the indictment concerning the interstate character of the messages, etc. and the defendants contended that the indictment was insufficient. The District Court for the Southern District of New York held that the indictment was sufficient on the authority of *U. S. v. Varlack*, 225 F.2d 665, and on the *Weiss* case, *supra*. We believe that a reading of the *Gris* case as well as the *Varlack* case makes the holding in the *Gris* case somewhat doubtful for the reason that the trial court cites these authorities for the proposition that Section 605 is equally applicable to intrastate messages. In the *Weiss* case, *supra*, as we have pointed out, jurisdiction is extended to intrastate messages when necessary to control interstate communications or when necessary for the protection of interstate commerce to regulate intrastate transactions. The instant case, so far as we have been able to determine, is the first one in which the contention has been raised that the indictment should at least plead the constitutional requirements, i.e., that the conversation was either in or affected interstate commerce or being held over facilities which were a part of an interstate system.

In the *Varlack* case, 225 F.2d 665, the question was whether or not an indictment charging defendants with violation of the Hobbs Act (extortion affecting commerce) was sufficient when the indictment only referred to commerce and did not characterize it interstate or foreign. The Court of Appeals held that it was

sufficient, pointing out that the indictment referred to unloading of ocean vessels of raw sugar and further that there was a year between the time of indictment and the time of trial, which the Court of Appeals felt was ample time within which the defendant could have moved for a bill of particulars, etc.

We do not believe the Government seriously contends that it has jurisdiction over private intrastate communication systems, such as a private logging company telephone, an apartment house communication system, etc. Is the Court going to presume that the conversation was in or affected interstate commerce or communications simply because it was alleged that they were "telephone" conversations? If so, would a Dyer Act indictment be sufficient if it simply alleged that the defendant drove the car "along the highway"? We call the attention of the Court to the illustrative forms appended to the Federal Rules of Criminal Procedure, particularly Form 7 and Form 11, each of which contains the allegation of "interstate commerce." The reason seems obvious—there would be no jurisdiction of the crime of receiving the stolen vehicle, under Form 7, or delivering the consignment of adulterated food, in Form 11, unless *interstate commerce* was involved or affected.

We believe that on this ground alone this case should be reversed and remanded under Rule 34, F.R.Cr.P. "if the indictment . . . does not charge an offense or if the Court was without jurisdiction of the offense charged." This Court only has jurisdiction if interstate commerce was involved or interstate communications affected. Such does not appear from the indictment.

SPECIFICATION OF ERROR NO. 15

The Court erred in submitting only one form of verdict and in failing to submit at least the general not guilty verdicts submitted by the defendants.

(The verdict form tendered by the Government and submitted by the Court is found on pages 107 and 108 of the Transcript of Record—No. 29.) Omitting caption, it read as follows:

“We, the jury duly impaneled and sworn to try the above-entitled cause, do find the defendant, James Butler Elkins guilty, and the defendant Raymond Frederick Clark guilty of the crime charged in Count I of the Indictment.

“We, the Jury, etc.” (with identical language and identical paragraphs for Count II, Count V, Count VI, Count VII, Count VIII and Count IX of the indictment) . . .

“Dated at Portland, Oregon, this day of May, 1957.

.....
Foreman”

The defendants tendered a general form of not guilty verdict as to both, as follows:

“We, the Jury, duly empaneled and sworn to try the above-entitled cause, do hereby return our verdict and find the defendants, James Butler Elkins and Raymond Frederick Clark, not guilty.

“Dated this day of May, 1957.

.....
Foreman”

(Tr. of Rec. 223).

Similar forms of not guilty verdicts for each defendant were submitted (Rec. 224, 225) as well as the

various combination verdicts possible (Rec. 225-228). At the conclusion of the instructions, the Court instructed:

"There will be submitted to you one form of the verdict and this has been drawn in this manner so that it would simplify the matter for you. It reads as follows (Tr. 2524). 'We, the Jury duly impaneled and sworn to try the above-entitled cause, do find the defendant, James Butler Elkins'—there is a blank space—'guilty, and the defendant Raymond Frederick Clark'—and a blank space—'guilty of the crime charged in Count 1 of the indictment.' And then follows identical language on connection with each of the seven counts remaining in the indictment . . ." (Tr. 2525).

The Court then explained as to inserting the word "not" if their verdict was not guilty as to each defendant as to each count or leaving it in its present form if their verdict was that the defendant was guilty on such count. To this procedure counsel excepted (Tr. 2532):

"... but I specifically except to the failure of the Court to submit at least the general not-guilty verdict forms submitted by counsel and, also, I think, the not-guilty form as to each defendant individually. I think that it is error to submit only the one form of verdict which requires the writing of the word 'not' fourteen times before the defendants can return—or before the jury can return the verdict of not guilty."

ARGUMENT

We respectfully suggest that no criminal case should be submitted to any jury in the posture that it is more difficult to find a defendant not guilty than to find him guilty. In making this argument we are well aware of

the comparative triviality of writing the word "not" fourteen times. On the other hand, we are also aware of the practical importance of having the jury feel that it has a real choice between two forms of verdict. If the presumption of innocence has vitality, does it not require the submission of a "not guilty" form of verdict as well as the form submitted by the Government?

CONCLUSION

In light of the foregoing, it is urged that this case either be dismissed or, depending on the error found by this court, be remanded for a new trial with appropriate instructions to the court below.

Respectfully submitted,

WALTER H. EVANS, JR.,
BURTON J. FALLGREN,
Attorneys for Defendants-Appellants.

APPENDIX

In the hope that it would be of assistance to the court we have attempted to summarize or digest the testimony of the witnesses called on the Motion to Suppress and in the trial on the merits, and list them here in order, with transcript references. Compilation of this necessarily involved some editing and it is not contended that this is complete but is only offered in the hope that it will assist the government and the court in locating various passages of testimony in the voluminous record.

On the Motion to Suppress

(Page references in this portion of the Appendix refer to the two volumes of testimony entitled "*Defendants' Motion to Dismiss and Defendants' Motion to Suppress Evidence*".)

WILLIAM M. LANGLEY: He was District Attorney of Multnomah County, executed the affidavit in support of the state search warrant (41 to 43); that he received some "confidential" information and then information from Brad Williams, a Journal reporter (45); that the entire affidavit was executed on information and belief (47); that he obtained this information by listening in on an extension telephone while Brad Williams and the Chief of Police of St. Helens, Oregon (a Mr. Herder), had a conversation (49); that the telephone conversation took place with Mr. Williams and Mr. Langley in Mr. Langley's private office in Multno-

mah County Court House (50); that the tapes were played in his private office (60) and that that was before Elkins and Clark were indicted by the State Grand Jury (61); that he only heard them once (60) and that one of the tapes came off the reel while it was being played (61); that the State Court indictments were returned on the basis of "this evidence" (67) and that there was no cooperation between his office and any Federal agency in connection with the search and seizure (67).

ELLSWORTH HERDER was formerly Chief of Police at St. Helens, Oregon (71); that he never talked to Mr. Langley, that one evening in May, 1956 (73), a party called him on the phone and identified himself as Brad Williams, a reporter for the Oregon Journal (74); that he gave Mr. Williams some hearsay evidence telling him it was hearsay (75) and that he was positive this was in the evening (76) and his best recollection was that this was a Friday prior to the raid, i.e., May 11, 1956 (77); that he did not know the address of Mr. Clark and that after this telephone call ended and within three to five minutes of the end of it, the witness placed a person-to-person collect call to the Oregon Journal Building for Brad Williams, and he was connected to him promptly (78) and he recognized the voice as the same person he had talked to, that he had no personal knowledge of any obscene or indecent photographs or accompanying sound recordings (80); that he had discussed these pictures and recordings only on one occasion on one telephone conversation with Mr. Williams (81); that he never conveyed any such information nor

had any conversation with Federal officers concerning this transcript (83). At (84) the Government conceded that for purposes of the Motion to Suppress the State Search Warrant could be treated as illegal.

TERRY D. SCHRUNK at the time of testifying, Mayor of the City of Portland, and at the time of the raid, Sheriff of Multnomah County (86); that he went to the Clark home the evening of the raid after it had commenced (90) that he first heard of the raid about six o'clock after receiving a note that the District Attorney would like to see him; that he received the search warrant about six o'clock from the District Attorney and that Mr. Williams, the Journal reporter, was with him (91). That the witness had appeared on a live television program that night (the night before the primary election, when the witness was running for Mayor) and that after the television program he received a call and went to the scene of the raid (93 and 94); that there were tape recordings, wire recordings and slot machines seized at the time (97); that he does not know when he first saw the tape recordings, whether at the scene of the raid or at his office, but that they remained at his office the night of the 17th and the early morning of the 18th, but they did not remain in the safe (99); that the witness took his wife home after visiting the scene of the raid (99) and returned to his office about 1:00 A.M. Election Day (100); that they were played in the early morning hours of May 18 (103, 104); no Federal officers were present (104) but that Mr. Moore and Mr. Novak, a radio technician and a disc jockey, Mr. Brad Wil-

liams, the Journal reporter, and the Sheriff, were present (104); also another reporter may have been present, Doug Baker (105) and that Deputy Sheriff Minielly was present during a portion of the time (106); that he contacted the F.B.I. either on the Saturday or the Monday following the raid (108); that he had previously testified that "upon seizure (of the tapes) I called the F.B.I.," but that by upon seizure he meant that he was in the State court during a portion of the proceedings of a Motion to Suppress the Evidence but was not sure which day (114) that he was subpoenaed and he did not know whether it was a subpoena duces tecum as he did not know what a subpoena duces tecum was (115).

That copies were made of the tapes (116) "to protect the evidence" (117). When the witness was asked if the court (Judge Mears) ordered the tapes to be held by the witness, an attorney for the witness appeared and offered suggestions to the Court (117 to 119); that he called the F.B.I. because it appeared to him there was a possibility of "wire tap equipment being involved" (123) and that there was generally cooperation and exchange of information between the F.B.I. and the Sheriff's office (124); that it was the Sheriff's practice when they found evidence of a Federal statute or if they had knowledge of, or information to it, copies of their reports were sent or direct notification given to the various agencies involved. That this was good police work (126) that there were no Federal officers along on the raid on the Clark home (130) as far as the witness knew, no one from his

office contacted the F.B.I. until after the raid was completed (131).

HOLGER CHRISTOFFERSON—That he was a retired deputy sheriff, 70 years of age (132) and was Chief of the Criminal Department of the Multnomah County Sheriff's office for forty years, or 38 years (132); that during that time it was always the practice of the Sheriff's office to call in the appropriate law enforcement agency of the Federal Government if, in the investigation of State crimes, evidence of a violation of a Federal statute was also uncovered (134, 134) and that there was always good cooperation between the Sheriff's office and the various Federal enforcement agencies.

ROBERT W. FRANZ—was vice-president, director and cashier of the First Bank of Milwaukie (Oregon (137) and brought with him the records of the bank relating to certain safe deposit boxes (138) (exhibits, 11 and 11A); that safe deposit vault or box 912 was rented by the State of Oregon on June 4, 1956 (at no charge) (139); that it was rented to the Oregon State Police with Officers Cross and Gurdane being the authorized signers (141); that he had the list of authorized entries between June 4th and August 1st, 1956, and read them into the record (142); that there were three keys, two customer keys issued to Mr. Cross (145) and a guard key held by the bank (147) and that they were the usual safe deposit boxes (145 to 147); that on September 5, 1956, at 3:00 p.m. the records indicated that Officer Gurdane opened the box in question, that he was present on the latter date, and

Officer Gurdane and Ronald Sherk (an F.B.I. agent) were present (150); that he took a receipt for the property removed from the box (151) (Exhibit G-2) and the defendants agreed that a photostat of the entry record could be introduced (156).

The Motion to Suppress Exhibits were numbered (158). Langley Affidavit No. 3, Terry Schrunk Receipt No. 4 (signed by Minielly), the State Search Warrant No. 5, the Order declaring the Search Warrant a Nullity and Impounding Suppressed Evidence No. 6, the Transcript of Testimony at the State Motion to Suppress No. 7, the Affidavit in Support of Search Warrant No. 8; the Reply to Motion of Defendants for Dismissal of Indictment, Defendants' Exhibit 9. Counsel offered the exhibits and requested permission to read them into the record. The court ruled that they should be submitted to the court, that there was no necessity to burden the record (162).

FRANK J. KENNEY—was special agent in charge of the U.S. Secret Service (164); that in most instances there was common practice and understanding between his department and the state and county officials of the State of Oregon, that if the state and county or city officials should discover evidence of Federal crimes within the Secret Service jurisdiction, they would turn the evidence of that crime over to the Secret Service and make it available to them (165); that it happened in the majority of cases and that the Secret Service cooperated with the state officers in matter of mutual interest (166); that this practice was engaged in during

1956 and that the word "understanding" did not refer to a written agreement but a tacit, oral "taken for granted" understanding (166) that the Secret Service operated independently in its own sphere and that he knew nothing of the facts in the instant case (167); that the decision of what cases to prosecute was made by the United States Attorney's office.

RONALD E. SHERK was a Special Agent of the F.B.I. and had been for 16 years, and in Portland for 2½ years immediately preceding his testimony (168); that he was also a member of the Oregon State Bar (169); that he signed the original of the affidavit for the Federal search warrant, Defendants' Exhibit 8-I (169) in the early afternoon of September 5th, and secured the Federal search warrant, Defendants' Exhibit 8-I (169) the warrant at 3:15 p.m. by making a search of the safe deposit box at the Milwaukie First State Bank (171); seizing the minifon wire recorder and five rolls of tape recording and three rolls of recording wire for the minifon (171); that he first heard the tape recordings in the Multnomah County Sheriff's office on the 8th floor of the Multnomah County Court House, in the company of another F.B.I. agent (171 to 172) and Deputy Sheriff Minielly (174); that this occurred in the early afternoon of Tuesday, May 22, 1956, and that he heard only part of one tape; that it was between 2 and 2:30 p.m. (196) and that the session was cut short when Minielly told Mr. Sherk that the Grand Jury wanted the tapes (195); that the witness recalls a discussion in the F.B.I. office Monday concerning newspaper articles and speculation as to whether or not

the tapes contained evidence of a Federal violation and that his superior, Mr. Santioana, the agent in charge of the office, directed him to go to the Sheriff's office to hear the tapes. Counsel inquired as to written reports (180). The Government objected. The Court permitted the witness to testify that there was a written report made, that he had been served with a subpoena duces tecum. The Government again objected and called attention to the fact that it had filed a Motion to Quash the subpoena (182 to 183); that the witness made notes of what he heard on the tapes on May 22, 1956, and they were made in his official capacity as a special agent of the F.B.I. and that they were in the file of the F.B.I. (185, 186); that the witness thought he recognized the identity of one of the voices in one of the conversations he heard on May 22nd as that of the District Attorney, Mr. Langley (188 to 190); that he saw five tapes, but he could not swear under oath as to the color of the boxes (193); that he played only one tape or a portion of one (194); that he did not recall how they happened to select the one particular reel that was partially played. The Court sustained an objection to the question as to whether or not Mr. Sherk knew that the Motion to Suppress was pending in the state court at the time he heard the evidence. The matter was discussed and counsel presented his theory to the court (196 to 208) and the court sustained the Government's objection after argument (208).

Mr. Crawford explained defendants' theories of the Motion to Suppress (210 to 212); that the witness Sherk did not hear the tapes again or any portion

of them until a few days after September 5th (215) and that from the time he heard a portion of one tape on May 22, 1956, until after the Federal search warrant had been executed on September 5, 1956, he had not heard any of the tapes (216); that there were notes in the box accompanying the reel of tape recording which he heard, that there were notes apparently relating to the identity of the persons whose conversations were allegedly on the tapes and that these names were on his notes to his superior (219); that the witness felt that because the alleged telephone conversations were recorded they were therefore intercepted (226).

When the witness Sherk was asked what facts he had in his possession and what was the extent of his personal knowledge on which he based that portion of his affidavit that the "intercepted telephone conversations were designed or intended for the use or benefit of a person or persons other than the senders" etc. (229) the witness asked the court to take judicial knowledge of the statements in the public press. He then stated that it was based on the publicity and the public press concerning tape recording generally, and that the tapes were obtained by the Sheriff's office from a source other than one of the participants to the conversations (230) and that the witness had been in error when he stated there were four rolls of recording wire (232).

That although he had only heard part of one tape he asked for five tapes in the affidavit for the search warrant because he knew there were five tapes there (233); that he couldn't be sure which one had the intercepted telephone conversation and that the notes on

all of the boxes were similar and he had been informed by the Sheriff's office that they contained intercepted telephone conversations (234).

That the witness did not have access to the safe deposit box but did enter the box and inspect the contents on August 13, 1956; that the first time he talked to witnesses Maloney and McLaughlin (241) that he had never talked to Gamruth (242) and that he had talked to Mr. Sheridan several times but with reference to these tapes only at the time of the "Grand Jury" in the early part of 1957; that he talked to Mr. Langley concerning this matter about May 29, 1956 (243); that when he entered the box on August 13, it was in the presence of Officers Gurdane and Cross of the Oregon State Police (174); that on that occasion he did not play the tapes (279) but simply looked at them (280) but he could not recall the color of the boxes and he did not know of his own knowledge that they were the same tapes although he believed they were (281); that neither the tapes nor the reels had been marked by Mr. Sherk (282).

Argument over whether or not Crawford claimed ownership of the tapes (286) et seq.

That is is impossible to tell what is on a tape from merely looking at the outside (290); that the box was opened by a key of the State Police Officer, Mr. Gurdane, and Mr. Franz, the bank manager (297); that he did not know of his own knowledge, at the time he opened the box, that the articles he found were in there prior to its being opened (297) and that he did not know of his own

knowledge that they were in the box at the time he executed the affidavit before the U. S. Commissioner (298).

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RONALD SHERK (continued)—That one of the reels seized on the Federal search warrant was the one to which the witness had listened on May 22, 1956 (305). That the witness had not talked to any of the other individuals whose conversation was reportedly recorded on the tape and therefore did not know whether any of them had consented to the alleged interception prior to September 5, 1956 except Mr. Langley (307). That in the witness' opinion parts of the recorded conversations were "recorded directly off the wire" (310) but that he, at the time of executing the Federal search warrant affidavit, had no information of his own knowledge as to the contents of the other four tapes (311). That in Sherk's opinion some of the conversations were recorded by means of a microphone concealed in the telephone instrument (313).

At this point (315) the Government took the position that further inquiry was immaterial unless the defendants would acknowledge ownership of the tapes or at least one of them and further (316) that it was immaterial whether or not the federal seizure was pursuant to a valid search warrant because the documents had been handed to the Federal authorities on a "silver platter." Defendants contended that it was not necessary for them to admit ownership in order to move

to suppress since they had been indicted based on the evidence in question (318-319) and that it was sufficient to show that they were taken from the home of one of the defendants. Counsel for the defendants refused to admit that the legality of the Federal search warrant was immaterial (321) and the Court ruled (321-322) that it was immaterial as to whether or not the F.B.I. had a valid search warrant at the time they took possession and ruled that the defendants were precluded from inquiring further as to the basis of Mr. Sherk's knowledge or lack of knowledge when he executed the affidavit for the search warrant (323).

Sherk testified that he had in most instances turned over to State authorities evidence of State violations when the same was uncovered in connection with his investigations (326).

Defendants' counsel then requested the reports referred to in the subpoenas duces tecum (328) and the matter was argued, the Court marked a copy of the subpoena duces tecum (332) and ruled that the witness' testimony was primary evidence (332) and that any reports would not be competent as primary evidence and could only be admissible for impeachment and again (336) counsel asked the witness to produce any reports that he had made to his superior or to the United States Attorney during the periods of time mentioned in the subpoenas duces tecum, and the Court denied such request. Sherk stated that although there was cooperation between the State and Federal agencies, they operated independently (336-337); that there was no understanding with reference to this partic-

ular raid and that it was the decision of the United States Attorney as to whether or not Federal prosecution should be undertaken.

OSCAR HOWLETT was a deputy District Attorney on the staff of Mr. Langley and represented the District Attorney's office in the motion to suppress before Judge Mears. Mr. Howlett stated that he read to the State court judge in the State court motion to suppress hearing, a letter written by Mr. Langley to the Attorney General of the State of Oregon (343) which stated in part,

"Wire tapping, as you know, is both a state and federal violation of law,"

That he could not say whether or not the State District Attorney was contemplating turning over to the Federal Government the seized material on the 18th and that he read the letter because he was given it by Mr. Langley before he went down to the hearing on the 21st or 22nd of May (344). That in his mind he intended proceeding with a State prosecution (346) and that defendants' Exhibit 12 was a copy of the answer to the motion to suppress filed by the District Attorney in the State court proceedings, and admitted that at the time of the State court hearing one of grounds urged in opposition to the motion to suppress was that the State district court had no power to suppress because the seized evidence constituted violations of Section 605 of the Federal Communication Act (349, 351 and 353). That he did not tell the district court that copies were being made of the tapes (354) nor that one of the reasons the tapes could not be produced into Court

was because the FBI agent, Mr. Sherk, was listening to the tapes (355), and that the tapes were not produced until the 23rd, the last day of the hearing (356).

HOWARD LONERGAN was a deputy District Attorney and an ex-F.B.I. agent (363) and was chief criminal deputy in the District Attorney's office (363); that defendants' Exhibit 13 was signed by him. Mr. witness Lonergan appeared before a State Court Circuit Judge, Judge Lonergan (no relation) and at that time urged that the State indictment for wire tapping be dismissed for the reason that a Federal prosecution of these defendants would be facilitated (367). This was done on September 11, 1956, or six days after the execution of the federal search warrant and prior to indictment by the Federal Grand Jury and the Court sustained an objection to the question of whether or not on January 10, 1957, the witness appeared with Clyde Crosby with a criminal complaint signed by Crosby before the United States Commissioner (question on page 368 and the Court's ruling on pages 370 and 371); that he felt the State Attorney General had wrongfully conceded that the State search was illegal (372) and that therefore if a prosecution was to be successful it would have to be by the Federal Government (372). The witness discussed his theory of State law applicable to search and seizure (372 to 376) and stated that before the seizure he had no understanding nor any contemplation that any evidence seized would be turned over to Federal authorities.

RICHARD NOVAK—that he was a “disc jockey”

(378) working for the Oregon Journal radio station and went to the Court House in Multnomah County election night, May 19th, on orders from the manager of the radio station; that he went to Sheriff Schrunk's office on the main floor, set up his equipment consisting of two recorders (380) and thinks he saw six tapes (381) and that he was there from 2:30 in the morning until 6:30 or 7:00. That he heard some abbreviated names and nicknames (382-383); that he gave the copies of the two tapes to Brad Williams, the Journal reporter (385), that Mr. Williams was present during the entire time that Novak was there (385); that parts of the recordings he listened to had only background noises and room noises or conversations so subdued it was unintelligible (387) and that he did not make complete copies, but only copied what he was directed to by Mr. Brad Williams.

VAYNE GURDANE—That he was a State Police Officer and signed the bank safe deposit records as a person authorized to have access to the safe deposit box in question; that at no time did he take the tapes out of the box and that the first time he personally had any inquiry from Federal officials about the tapes was the last of July (1956) (393-394), and that was from Mr. Luckey, the United States Attorney (394). That he was holding them for the Attorney General of the State of Oregon who had been assigned the investigation of vice conditions by directive of the Governor of the State of Oregon (394-395).

GEORGE MINIELLY had been a Deputy Sheriff in Multnomah County for twenty-seven years and was

so acting in 1956 (397) and that on the 17th he was called by the Sheriff and asked to execute the search warrant on the premises of the defendant Clark (397) and it was necessary for him to use force to enter the front door (398); that there were only two women present when he entered—one being the defendant Clark's wife and the other a woman identified as Sonny Martin. That there were at least three uniformed officers along (398-399) and two Journal reporters (400) and a Journal photographer, Mr. Lee (400); that he did not know how the reporters happened to be present (401); that the defendant Clark arrived about 15 or 20 minutes after the officers gained access (401); that he looked for but he did not find any obscene photographs; that he looked for about 2 hours (404) but he did find some tapes and sound recordings in a hassock (404); that the hassock was between the two women; that he lifted the lid off the hassock but that he did not recall either of the reporters saying that was a hassock (405-406), and that he found five cardboard boxes stacked one on the other in the bottom of this hassock; that there were only five rolls of tape and that it was true that when Mr. Sherk was looking at the five reels of tape in the Sheriff's office Mr. Buell was untwisting a roll of tape in the District Attorney's office but that the reason for the confusion was that one of the boxes in Mr. Sherk's presence was an empty box (408); there were small notes or note paper with synopses on them with the boxes (410); that he does not believe there was anything about telephone or telephones on them (410);

that he found "thousands of phonograph records" (412) but only took two albums which defendant Clark identified as "party records"; that one of the newspaper men did ask him "did you look in the hassock" (413), in the State Court proceedings, answered the question as to how he happened to look in the hassock by giving the answer "That's my business" but that he was annoyed and it was an unfortunate remark (413-414). That he took the tapes out of the hassock, took them to the basement with him, set them on a bench where he could be alone and not be bothered by persons to examine the contents of the boxes (415) and after about five minutes returned upstairs and then locked them in his car out in front. That everyone present seemed to want to get their hands on them (415). That he had previously testified he had never played the tapes, which was correct. He had heard them played but hadn't played them himself (418). That he went home and went to bed and was called by the Sheriff and told to bring down a list that he had in his possession which he had found in the Clark residence (419), the list being a list of all the Deputy Sheriffs, their residences and their shift and what precinct they worked; that he signed Exhibit No. 2 (426); that it was made out by one of the other Deputy Sheriffs but that he was confused that night and there were errors made in the receipts (426); that he initialed the boxes in the Clark residence shortly after he seized them while he was down in the basement (427); that he seized a payroll book which had no obscene pictures or sound recordings, a 8 millimeter movie projector and three reels of children's film (429-430);

that he delivered the tapes to Sheriff Schrunk and was also present when Sheriff Schrunk handed them over to the State Attorney General, and that Mr. Clyde Crosby was also present at that time (430). (We think this may have been an error in transcription and that the man in question may have been Claude Cross, the State Police officer). That Mr. Minielly neither conferred with nor had any understanding with any Federal officials prior to staging the raid (431-432); that there was a common practice and understanding on the part of the Sheriff's office relative to reporting evidence of Federal crimes to the appropriate Federal bureau (433) and that he always did it (433) but that he operated independently of the Federal officers (434).

(Exhibits 14 and 15 were identified being the photostatic copies of the Governor's directives.)

CLAUDE CROSS was a lieutenant in the State Police (435) and was working under the Attorney General of the State in connection with the vice probe directed by the Governor; that he was present when Sheriff Schrunk and Mr. Minielly turned over to Mr. Thornton the five tapes in question, the Minifon, and the three reels of Minifon wire and that he kept them in his possession until June 4, 1956 (439-440), at which time he put them in the safe deposit box; that it is common practice of the State Police to turn over evidence of Federal violations to the appropriate Federal agency through channels (444).

VAYNE GURDANE recalled—That he turned over the five spools of tape to Mr. Sherk by virtue of the

search warrant (447) and that Lieutenant Cross was absent at the time (447).

JOSEPH SANTOIANA, Jr., the special agent in charge of the F.B.I. for the Portland, Oregon, District; that prior to May 17, 1956, he received no complaints from anyone with reference to any wire tapping activities and that he was on duty during May, 1956, but in and out of Portland (451). That he did keep records of complaints (453) and that the F.B.I. was the agency charged with the primary duty of investigating wire tapping (454). The witness refused to answer the question as to whether or not there was a complaint in his files complaining of wire tapping activities on the part of these defendants prior to May 17, 1956, by reason of the Departmental Executive order, and after discussion the Court instructed the witness he need not answer (456). The Court stated that its reason was that he felt it was immaterial. The witness volunteered that in answering the question he did not want to infer either that they were or were not conducting any investigation concerning the matter but was simply following what he believed Departmental instructions, to-wit, Departmental Order 3229. He further stated that (458) prior to and on May 17, neither he nor his office had any knowledge that the raid was going to be "pulled off" (458) and that his first notice of the raid was the daily press (459) and that he sent Mr. Sherk to Mr. Schrunk's office at the request of Sheriff Schrunk (460). The witness at page 465 volunteered the statement that the F.B.I. had no such agreement or knowledge nor made any agreements with any law enforcement agents as

to prosecution or turning over of any evidence in any case where it had concurrent jurisdiction or where the jurisdiction was solely that of the F.B.I. and Mr. Luckey then asked him the question calling for the above answer (465).

The balance of the record in Volume II relates to the discussion between the court and counsel of the motion to suppress, the argument thereon, and the Court's ruling denying the motion to suppress (519 to 531). This was delivered approximately 5:15 p.m., April 12, 1957.

On the Merits

(Page references following refer to the "*Transcript of Proceedings*," Volumes I to XV.)

After the jury was selected, the Court then arranged for the copying of the tapes by a technician employed by defendants in open court, the copying to be done at the same time the recordings were being played for the court and counsel, and it was decided to hear them en camera on the first occasion. Also, the court introduced an editorial into the record as the Court's exhibit, which counsel stated they had nothing to do with. The technician was sworn by the Court (99) and the witness Sherk was called out of the presence of the jury to identify the tapes. There was no cross-examination on the preliminary identification (104-105) and the parties proceeded to a discovery proceeding consisting of listening to the contents of the tapes (Government's Exhibits 1 ot 5, inclusive) and to have copies made of

them by a technician under direction of the Court. The listening and copying was commenced the afternoon of April 18th (109-111), recessed at 6:30 p.m., convened at 7:30 p.m. the 18th, and ran until 11:45 p.m. April 18th, recessed until 10:30 a.m. the 19th. The morning of the 19th the Court was advised that the State court had granted a temporary injunction restraining the State officers from testifying regarding the search and seizure and continued until noon April 19th, recessed until 1:30 p.m., concluded at 5:15 p.m., April 19th, and counsel for the Government made its opening statement with defendants counsel reserving their opening statement until the close of the prosecution's case (160) and the first witness was then called, who was

RONALD E. SHERK, an F.B.I. agent who was assigned to investigate wire tapping allegedly involving the defendants (164) and that he acquired possession of certain tape recordings on September 5, 1956, at the State Bank of Milwaukie (165).

(It was stipulated that an objection on behalf of one defendant goes to both unless it had particular application only to the situation of one defendant (166). Also the defendants renewed their objection on the ground that the evidence had been suppressed by a State court and the Court asked "Don't you think your record is preserved on that point?" (166-167). Over counsel's objection that it called for a conclusion of the witness and was not the best evidence (167), the witness was permitted to answer the question as to the

nature and substance of his observations as to what was on the reels and answered that there were voices of men, the sounds of doorbells that sounded like doorbells, sounds that sounded like telephone bells ringing, sounds that sounded like operators working calls, people answer-telephones (169).

SHERK continued that he did not hear Government's Exhibit 1 until September 6th, that he was positive he saw Government's Exhibit 2 on May 22nd but that he only examined three reels of tape and saw a total of five boxes and he has since learned that one reel was missing at the time he saw the boxes, therefore he could not be sure of what other reels he saw on May 22nd other than Government's Exhibit 2 (177-180); that he placed no marks on either the tape or the box (181) and that it was impossible to tell from looking at the tape whether it contained anything or not (182).

The Government then offered the exhibit (191 as evidence of the corpus delicti (171) and defendants objected (191) and the Court overruled the objection and received the evidence for the purpose of proving the corpus delicti (194). Defendants also objected on the ground of lack of a proper foundation (195). Counsel for defendants pointed out that Exhibit 1 had been identified as the reel, 1-A as the cardboard box, and that the tape had not been offered (196).

Mr. Sherk identified Exhibits 2, 2-B, 2-C, 2-D, 2-E, 2-F and 2-G (212-213). He also testified that it was his observation that it contained the voices of men and

women, operators working a long distance call, the sounds of telephone bells ringing, and buzzing sounds such as made by a telephone bell heard through a telephone line. Defendants objected to the receipt of Exhibit 2 on the same grounds as No. 1 and enumerated then (220-221) and the Court overruled counsel's objections (226).

Sherk identified Exhibits 3 and 3-A and 3-B (238). They were offered in evidence (245), objected to (245-246), objection overruled and admitted the evidence; that the F.B.I. made one copy (264); that he did not know of his own knowledge whether or not other copies had been made (265) but that it would be impossible for him to tell whether the tapes offered were original tapes or copies (265). The Court sustained the Government's objection as to the inquiry as to who was present when the tapes were played before the Federal Grand Jury (260-261-263). The same objections were interposed to Exhibit 4, sub-4, etc. (268), which was overruled (69). Mr. Sherk identified Exhibits 5, 5-A, 5-B and sub-5 (275), and he testified that apparently other F.B.I. agent had access to the tapes (278). The same objections were made and the Court made the same ruling admitting the exhibits (279). Mr. Sherk then identified the slips of paper as being found by him with the reels of tape (Exhibits 1-B, 2-B, 2-D, 2-E, 2-F, 2-G, 3-B, 4-B, and 5-B (288). Goes to page 292 where we start Maloney's testimony.

THOMAS E. MALONEY testified that he lived in the King Tower Apartments in Portland for about three

months—August, September and October of 1955 (Tr. 292, 350, 351). He described the apartment (293); that there was an “outside phone” and that he had previously lived at the Park Plaza in Portland (295); that he had known the defendant Elkins since 1953; that he told Elkins he was going to move into the King Tower (296) in the middle of July; that while in the King Tower Apartment he made and received telephone calls (297); he identified a conversation on the tape as being between him and “Bill” (William) Langley (304); that he did not have knowledge that the conversation was being recorded and that he did not consent to having anyone intercept that conversation nor did he know that it was intercepted (305); nor did he authorize anyone to divulge the contents of the conversation (306). He identified a similar conversation between him and Tommie Sheridan (306). He identified another voice (308) but his answer was stricken (309).

With regard to another conversation, at page 311, he first stated he could not recognize anything about the voice but later stated that he know that the party talking was “me” (311) and that he talked to somebody about fishing at Jamiesen Lake (312) but that he did not recognize the other voice. Over objection, he was permitted to answer the question as to when “the conversation” took place (312-313); that it was made in September of 1955 when he was living at the King Tower (314), and that he did not consent to interception or divulgence (Incidentally, he identified or listened to three conversations on Exhibit I with the

third being stricken, the Jamiesen Lake, Joe E. McLaughlin, conversation was 2-1 and 2 (314-315); was identified as a conversation between the witness and Mr. Langley by telephone from the King Tower with a similar lack of consent to interception, divulgence, and a lack of knowledge (315-316).

The next conversation was identified as being to Mr. Gamrath in Seattle from the King Tower with similar lack of consent and knowledge (318). The witness then did not identify No. 7 (2-7, page 319) but did identify 2-8 as being between himself and Tom A. Sheridan with the call being from the Maloney apartment to the Liquor Commission with similar lack of consent (320). He did not recognize the next one except that he recognized his own voice but he did not recall making such a call and the next one he thought was Joe McLaughlin's voice and he himself, and he "believed he placed the call from the King Tower Apartments with a similar lack of consent (322). With respect to the next one (323), he did not recall the conversation but he recognized the people talking as being the witness and Tommie Sheridan but would not say who placed the call but testified as to similar lack of consent.

At page 324 the witness objected because he stated a record of his boy was being played; the Government directed that it be played and it then appeared that that was not the conversation to which the witness was referring. He could not identify any but his own voice on the call in question. He recognized the next call as between between him and son Ricky (326), with similar

lack of consent and that he never consented to having any one record telephone conversations at his home in Spokane. The witness then identified part of a conversation on the second side of reel 2 by its "Jamisen Lake" content with a similar testimony as to lack of consent and knowledge (330), and identified conversation 3 on this side as being between himself and Tom Sheridan with similar lack of consent and a conversation with the District Attorney, Mr. Langley (332) with similar lack of consent or knowledge (333-334). Exhibit 3 was played and again the conversation was identified as between the witness and Mr. Langley from the witness' apartment with similar lack of consent. The Government then skipped to No. 3 on this side of this reel and again identified Mr. Langley and himself and he identified this conversation by saying that "Joe was taking a shower" (336). The witness then played conversations 4 and 5 which were apparently one conversation and he identified the last part of the conversation as being between him and Sheridan and arranging a meeting (338) with similar lack of consent and knowledge (339). At this point the Court pointed out that there was one count relating to a conversation between Maloney and Sheridan and that three conversations had been identified. The Government contended they would elect as to which one as to the Sheridan count and that the others would be admissible under the conspiracy count. Defendants objected to this (341-342).

On cross-examination the witness testified that he has been employed by race tracks off and on for 18

years except for a couple of years in business, that he has run card rooms, that the Spokane city directory was in error when it listed him as a teamster organizer (349); that he had no connection with the Teamsters except friendship; that he was never employed by them but that he was employed by the District Attorney of Multnomah County with the occupation of "getting addresses of sporting houses and turning them in" (349-350), that he was an investigator but not employed on a regular salary but to receive \$100.00 now and \$50.00 now and \$150.00 now (350) and that he was employed as such investigator during the period of the conversations he had identified; that he did not know whether 502 or 503 was his apartment number at the King Tower; that there was a common wall in the kitchens of Apartments 502 and 503 (353); that his phone number he thinks was Capitol 8-1707 (354), listed under his name but unlisted in the phone book at his request (354); that the telephone was in the living room but had a long cord (355); that the end of the long cord was fastened to the wall in the living room on the west side but that it would reach into any room in the apartment (356); that most of the time the phone was kept in the living room and sometimes in the kitchen and when he was sick, in the bedroom (356-357); that the witness got gout when it rained or got cold (358) and that he thought two or three of the phone calls were made when he had the gout and, if so, they would have been made from the bedroom (357), but he could not remember which calls they were (358) and he had no recollection of which

calls he had made while he was sick (358). When the phone was in the living room it was kept on a desk on the west side of the wall between the living room and kitchen (359); that there were cupboards around the kitchen side of the wall; that he never had offered a duplicate key to Mr. Langley or to anyone else. That the nature of his acquaintance with defendant Elkins between 1953 and 1955 was that he had interceded for Elkins to Mr. John Sweeney to get Elkins' employees into the Teamsters Union (364); that he had met Sweeney at the Long Acres Race Track in Seattle and that at Maloney's intercession Sweeney let Mr. Elkins' men into the Union (365). That the witness then later contacted Mr. Elkins (365) and that he had contacted Elkins after that (365) and that Elkins gave him \$200.00 once and that Maloney borrowed \$300.00 more from Elkins and still owed it to him (366); that he saw Elkins in '55 in his apartment (367) including the King Tower (368). That he was asked by a lawyer and Elkins to work to help elect Langley (368) but neither could produce Langley so he did not meet Langley (369); that he finally met him by going up to him and telling him that the Teamsters Union was going to support him (Langley) and that Elkins was going to pay Maloney's expenses while Maloney was there (369). That Mr. Langley's father objected to Maloney's helping (369) but that Maloney did work 17 or 18 days helping Langley and the Democratic party (370); that he took Langley to the Longshoremen-Carpenter's & Boilermaker's Union, etc. (370); that he was in business with Elkins during 1955 (372) "with an interest in

licensed card room," that Elkins kept the witness going (372) by giving him money so he could live and eat (373); that the witness thought this was done because the witness had used his influence to get Elkins' employees into the Teamsters Union (373) and that this gratitude continued from 1953 to 1955 (374) and that during 1955 the witness, Elkins, and others were trying to get in the punchboard business including one Mr. McLaughlin, and that the witness tried to get Mr. McLaughlin interested in buying a "legal card room" for the witness in Kenton (376), that with reference to card games when the witness in the recorded conversation had told Mr. McLaughlin that he had been to "Archer's joint" until 3 o'clock in the morning and stated "he had a poker game" etc. and when the witness then said, "Well are we in on that too?" it was "just crazy conversation, just talking on the phone" (379-380) and that the witness really didn't mean it (380). The witness denied having any understanding with Mr. Elkins and Mr. McLaughlin as to a share in the profits of poker or card games (382) and stated that any monies received by him were received simply as money for him to live off or in payment of an obligation (383). The witness stated that when he called Seattle he was working in his capacity as investigator for the District Attorney (387). That the witness paid over \$100 a month for the apartment at the King Towers (390); that he bought a 1950 Chevrolet automobile; that he registered the automobile in his name and gave his address as the Teamsters Hall or the Teamsters Office. The defendants then proposed to play

an exhibit (Defendants' Exhibit 11 and 11-A for identification) to the witness to see if he could identify his voice. This was done out of the presence of the jury and the jury was then recalled and without hearing the recording the witness was asked the question as to identification and stated he could not recognize anyone's voice on the reel (426). The Court sustained counsel's objection as to whether or not the witness had ever authorized Sheriff Schrunck to record his conversation; that the witness checked into the Congress Hotel where his bill was paid by the defendant Elkins (440); that his telephone bill was paid by Joint Council 28 of the Teamsters Union (441), and Mr. John Sweeney is deceased (441); that Mr. Elkins gave Maloney the cash to pay Maloney's bill at the Roosevelt Hotel (441-442); that he received a total of \$1200 or \$1300 from the District Attorney as salary (443) and that he was paid in check in the first several instances but then in cash (443-444); that his services were closing up houses of prostitution and giving addresses of a couple of bootlegging joints.

That Maloney did not know how many times Langley had come to Maloney's apartment (446), maybe five to eight times and that the witness used to go to Langley's house and that the District Attorney used the witness' apartment once when the witness was gone. That he was not Langley's campaign manager but assisted in the campaign along with other Democrats (447). The Court overruled defendants' request to play Exhibit 11 for identification before the jury, reserving to defendant the right to identify it in its case in

chief. The Court also ruled that the defendants did not have the right to cross-examine the witness Maloney by asking him whether or not he had consented to anyone else other than defendants recording his conversations, making copies of the recordings in question (459-460), and refused to permit counsel to ask him whether or not the witness authorized any third person to divulge any of these conversations unless counsel would "claim that these defendants have authority to that source" (461). At page 465 the Court ruled that counsel would be permitted to ask the witness if he authorized anyone to record or to divulge his testimony. At page 463 the witness stated that he had not identified any voices as Joe McLaughlin but he merely said it "sounded like" his voice and he would not say that Mr. McLaughlin was a party to the conversation. That he returned to Spokane in October of 1955 (474) although he worked for the District Attorney in Portland till December of 1955 (475). That he could not live on \$200.00 a month and that his rent at Portland Towers was about \$210 or \$215; that while he was sitting in his automobile talking to Mr. Elkins some man took a picture of him (Elkins); that the man had a short barrel .38 pistol and that Maloney got out of the car, jumped in his automobile, rode to Forest Grove and three men followed him; that he didn't go to his apartment that night but returned home to Spokane. That Mr. Langley paid his expenses back from Spokane to check some addresses which he did over four or five days and for which he received \$150.00 (479). One or two more trips getting addresses for him.

That he never met Clyde Crosby near the King Towers nor was Crosby in his apartment; that Langley came to visit him; that Mr. Sheridan was in his apartment (481); that on the last day of October he saw defendant Elkins with a revolver in his hand; that Elkins laid the revolver alongside the seat and when the unidentified man took Elkins' picture Elkins got out of the car like he was going after the fellow (488, 489); that it was a snub-nosed .38 police revolver. The witness first stated that he did not tell his boss, the District Attorney, about this episode or about seeing Elkins with the gun (490). Then said he might have told him later on (490); then said he did tell Mr. Langley the next time he came down here (491); that the Journal article was 99 per cent correct (494), but was incorrect when it said that Jim Elkins pointed a snub-nosed revolver right at Maloney (494); that he was working for the District Attorney when he had one of the conversations identified by him on direct as being with Tommie Sheridan and told Tommie Sheridan he did not want this witness to come down here from Seattle (498) and when he did not want Mr. Sheridan to talk to the District Attorney, Mr. Langley (499) that this conversation was really just a test for Mr. Sheridan (500); that he didn't want Sheridan to talk to Langley because his conversations with Sheridan were "personal"; that Sheridan was State Liquor Law Administrator (508); that in the conversation when he spoke of the "kid" they were referring to Mr. Langley, the District Attorney (509).

(NOTE: In certain copies of the Transcript, pages 515 and 516 are reversed.)

That he had never complained of his phone being tapped (521).

That he did not on May 18, 1956, give Terry B. Schrunk, then Sheriff of Multnomah County, permission to record his conversation (530-532) nor to Bradley Williams nor Charles Moore (533) nor to Richard Novak (534) nor to Clyde Crosby; that the witness, by using the term "Willy" was referring to Mr. Langley, the District Attorney (537) and that "Crosby" referred to the Representative of the Teamsters Union and "John" referred to John Sweeney, Secretary of the Western Conference of the Teamsters (538); that when he rented the King Tower Apartment he gave the Teamsters Union as a reference and it "was a lie" and that he probably registered at other hotels as a representative of the Teamsters Union; that he did not know who he referred to in Seattle by the name of Tim but he did know a Tim McCulloch in Seattle who was Sheriff of King County; that it was his voice on the tape and he believes he was talking to Mr. Langley when Mr. Langley said "Knock them out in Seattle so they can come down here" but that he had no recollection of such a conversation (546) and that in one of the conversations he had just heard he had called Mr. Langley "kid" to his face. The witness denied that his voice was recorded on Defendants' Exhibit 13, for identification, but that it was his voice on the Government's recording and that his voice was not on the last recording on Exhibit 13 and he did not recognize either of the other voices as belonging to Langley or McLaughlin. The Court refused to take judicial notice

of the transcript of certain recordings present in the stenographic transcript of the Select Committee hearings on Improper Activities in the Labor and Management Field before the United States Senate, Volume XI, on March 14, 1957, narrative content of which was identical with Defendants' Exhibit 13, and after argument adhered to its ruling (564) and in front of the jury the witness stated positively that it was not his voice nor the voice of Mr. Langley nor the voice of Mr. McLaughlin on Defendants' Exhibit 13.

MR. MINIELLY was called (568) over the objection of defendants. The witness stated (573-574) that he had been served with a restraining order restraining him from testifying and also served with a Federal subpoena and over the objection of counsel was ordered to answer the questions (577). He stated that he found the Government's Exhibits 1 to 5 in a large hassock located in the living room at the Clark residence and that at the time they were seized they contained reels of tapes and some longhand notations and identified the subletters of Exhibits 1 to 5, and stated that at the time he seized them he immediately took them to the basement, placed his initials on the back of each box and identified his initials; that he put rubber bands around them, went upstairs, took them out to his prowl car and locked them in his prowl car; that he had a conversation with Mr. Clark about the warrant and that the defendant Clark was asked by the reporter Brad Williams, "Did you make

these tapes for Elkins" and that Clark replied, "Yes, I did and you know it and that's why you're here."

(We observed that BRAD WILLIAMS was not called as a witness to corroborate this.)

and that there was allegedly present, besides Mrs. Clark and another woman known as Jerry Rogers, two uniformed deputies, Garth Stackhouse and Hal Lynn (580, 582); that about two hours later they left; that he carried the tapes to the Court House to the 8th floor and waited for the return of Sheriff Schrunk. When the Sheriff returned, he took the tapes downstairs, turned them over to him, and the Sheriff locked them up in the safe in the affice about 12:30 or 1:00 in the morning (583); that about 3:00 in the morning the Sheriff called about the list of deputy sheriffs which the witness had forgotten to leave at the Court House so the witness got up, got dressed, and returned to the Court House with the list and when he got there there were three or four men present and they were playing the tapes; that one of the men was Sheriff Schrunk; that he next saw the tapes the following Monday and he took them to the District Court before Judge Mears (584) and then he took the tapes to the Grand Jury room and they were played for the Grand Jury (584); then he took them to court the second time (585); then he returned the tapes to Sheriff Schrunk's office and they were locked in the Sheriff's safe; on Tuesday he took the tapes from the District Attorney's office and allowed two F.B.I. agents to look at them; he had the four tapes and five boxes with him as one of the tapes was in the District Attorney's office being untangled

(585); that it took 7 or 8 hours to untangle; that after the District Court hearing he took the tapes to Sheriff Schrunck's office on Judge Mears' orders and they were locked up in the safe of Sheriff Schrunck where they were delivered to Lt. Cross of the State Police; that he was the deputy selected by the Sheriff to organize the raid (591); that there were a total of five deputy sheriffs (595, 596); that he found slot machines in "the farthest corner of the basement" and that he now assumes the basement belonged to 2411 S. E. Main and not 2409 (600); that it was divided by a partition with a door; that at the time of the seizure he thought it was all one unit (601); that there were three reporters and two photographers present (601-602); that Brad Williams followed him up on the porch (602); that the reason he looked in the hassock was because the Journal reporter asked him about it (606); that he presently thought the basement was separated by a wooden partition but in his testimony on the State motion to suppress four days after the raid, he testified it was all one basement, "there is no separation, I had to go through no doors." That he could not tell by looking at the tapes whether there was anything on them; that at the State hearing he did not tell about going o the basement but testified that after removing from the hassock he took them to his car (618); that he never showed the boxes to Mr. Clark nor did he ask Mr. Clark if they were his boxes (625) although he was there two hours; that he did not make the inventory but he signed it the following Monday, the 21st, four days after executing the seizure, and that

the return was not made until May 22nd (631); and that the boxes of tape recordings were the same boxes as Exhibit 23, 24 and 25 (632) and that although he gave a receipt to Mr. Clark for the articles seized in the raid (Exhibit 17), the five boxes of tape (Exhibits 1 to 5, inclusive) were not included on the receipt (634); that the morning after the raid he saw two tape recorders for players in Sheriff Schrunk's office (637); that there was no identifying marks on the tapes themselves or the reels (641); that he next saw them on Monday or Tuesday following the raid when he started to pay them for the F.B.I. and had to interrupt to take them to the Grand Jury (643); that the tapes were not produced until the third and last day of the State hearing on the motion to suppress (646) and that the witness brought them to Judge Mears' court room but he does not recall whether he brought them from the Sheriff's safe or from the District Attorney's Office (646).

That the witness had not called the newspaper men to tell them of the raid (655-656) but that they had knowledge of it because they were waiting at the scene (656); that he had not previously told of the admissions allegedly made by Clark because he had not been asked (652, 654); that at the time of the raid he arrested defendant Clark for possession of slot machines (655) and not for wiretapping (666); that he placed no identification marks on the tapes themselves either by pin pricks or writing on the end of the tape because he was afraid he might damage something (668); that neither the tapes nor the slip of paper containing the list of deputy sheriffs, their shifts and locations, were

mentioned on the receipt. That he took the five boxes of tape and locked it in his car and that he knew of no other keys for his car (674) although there may have been duplicates (675); that he also seized and put on the receipt an amplifier, speaker, preamp, set of head phones and two short lengths of wire; that when Clark came in he wanted to know what was going on and that the witness asked him if he owned the building and its contents—if he owned everything in the building and that the defendant Clark said “I do,” and he was then placed under arrest by Minielly (687) for possession of slot machines; that Clark cursed and said something about Langley and his tapes had been found (689); that he made no mention of any oral admission in his report and he explained the mistake in the receipt (692) that the first items was 31 spools of wire records which contained symphony music but had first been listed and 31 spools of tape recording (692); that the list of slot machines were reversed as to stand-up and table-type machines (692); that the slot machines were in the basement under Sonny Martin’s house; that there was a door dividing the two basements but that it was open; that he also seized some Castle children’s film (693) and that he was positive there was only five boxes of tape recordings although the receipt he gave said six tape recordings but that should have been wire recordings; that he knew the law required him to give a receipt for all property taken (697) but that the matters omitted from the receipt he did not think were important or he forgot about theb (698); that he read the slips of paper inside the

boxes containing tape recordings (699) although he had testified on May 22nd, 1956, five days after the raid, that he just glanced at the notes, he didn't go to the troubles to read them (699). That he didn't know whether he read them the night of the raid or not; that he was having trouble with the newspaper reporters (700, 701); that when he testified on May 22nd, 1956, as to how he happened to look in the hassock he first said "That's my business" (705) and when asked if he had some information he replied he had no information whatsoever on anything (706) and that he said he didn't know how he happened to look in the hassock (706); that the night of the raid they were out of his sight for a short period of time and out of his presence and not under lock and key (712) and that they were put into the safe by the Sheriff; that he next saw the tapes on Monday where he picked them up at the Sheriff's office and took them to the District Attorney's office (716, 717); that the tapes were taken to Mr. Lonergan's office, the Chief Deputy for Mr. Langley (717) and he assumed that copies were being made at the District Attorney's office (718) although they were just playing them in Mr. Lonergan's office (719); that he personally found the Minifon (722) although in testifying on the federal motion to suppress he stated that one of the boys found it (722); that he helped carry the tape recorder and tapes to the District Attorney's office and when he next saw them (724) he got them back from the District Attorney's safe on the second day following or Wednesday (725); that he carried them into Judge Mears' court but one of the

boxes was empty because one had become entangled in the District Attorney's office (725); that the entangled tape was in the District Attorney's office (726) although at the time when he had the empty box before Judge Mears he testified the sack containing the tape was in his (the witness') office (726); that a number of people handled the tapes (732-733) and that when the witness went to the District Attorney's office to get the tapes the day after Judge Mears had ordered them turned over to the Attorney General (735), there was one whole day and night that the tapes were missing (736) and that the following day he looked in the District Attorney's safe and there the tapes were. That he was told by Mr. Lonergan that the tapes were not in the safe (736); that with regard to the handwritten notes he had previously stated he did not believe there was anything about telephone wording on the notes and that he did not know the night he seized the tapes that there was anything in the notes about telephone conversations (747); that the witness was confused when at the time of his testimony before Judge Mears on Wednesday, May 23rd, he state he had seen the tapes no place since delivering the to the Sheriff except in the Sheriff's safe; that the witness was then under indictment by the State Grand Jury and that the defendant Elkins was one of the witnesses called before the Grand Jury (769); that the witness had testified before the McClellan Committee (776) and had just returned therefrom (777); that Government's lettered Exhibits 1-B to 4-B were similar to the ones the witness saw the evening of the raid and that they do contain references to telephone con-

versations (787, 788); that in spite of his contradictory testimony on the point (790-792) he was positive that he saw all of the slips of paper the night of the raid in the basement.

The Mayor and former Sheriff, MR. SCHRUNK, was called, who stated he was under subpoena by the Government and also under a restraining order from the Circuit Court for Multnomah County and the Court advised the witness that the restraining order was a nullity insofar as it purported to interfere or restrain the process of the Federal Court (802) and that if he did not testify it would be necessary to deal with the matter in contempt proceedings (803). The witness' attorney was present, who made the record that the witness had previously been subpoenaed by the defendants (on the motion to suppress, second, that there was a valid Government subpoena served on him, and third, that the federal court had advised him that failure to testify would result in appropriate action by this Court and, fourth, that he was answering on advice of counsel (805).

Terry Schrunk (continued) (808)—That he had a call late in the afternoon of May 17th. That the District Attorney wanted to see him and that at about 6 p.m. the District Attorney brought the search warrant to the Sheriff's office and insisted that it be served forthwith (809). That Minielly called him that evening and he went to the scene of the raid. That his wife was in the car with him since it was their wedding anniversary (811). That he stayed there only ten or fifteen minutes (813). That he went to the Court House

at which time he was handed the five boxes of tape (814). That there was a synopsis of what was allegedly contained on the tapes in each of the boxes (814) and that he, the Sheriff, decided the best thing to do to preserve the evidence was to see that copies were made and stored "in a safe place away from the Court House" (815). That he called the Oregon Journal and asked for technicians to make copies of the tapes; that he gave the tapes to the technician and copies were made and that he watched to make sure he got the original tape back (816). That the witness followed the alleged "synopses" while the tapes were being played the first time (824); that he could not say the synopses and the contents of the tape were identical although he recalled nothing that had been omitted (825). That he gave them to and received them back from Mr. Minielly two or three times (828); that he turned them over to the Attorney General, Mr. Thornton (828); that he turned them over to the Attorney General by reason of the order of Judge Mears (831). That when he turned the originals over to the Attorney General's office he did not turn over any of the copies (835). That at the time he turned them over he knew that the Governor had issued a directive to the Attorney General directing him to take charge of the Grand Jury and investigate the situation in Multnomah County (835). That he did not know that Judge Mears had ordered that any copies that had been made also be turned over to the Attorney General (836). That the copies he made for safe keeping he sent to the vault of the Oregon Journal with the two newspaper reporters (837). That the witness

did not mark the tapes as distinguished from the reel or the box; that the Sheriff's office has a tape recording machine and a wire recording machine (839); that he does not recall asking the technicians whether or not the tapes could be marked (840). That only the Sheriff and one of his former secretaries had the combination to the outside of the safe and that there was a latch-type door on the inside (843-844) and inside the latch-type door was another small compartment under lock and key of which the Sheriff had the only key (844); that he does not recall making any investigation when the tapes were reported missing for about twelve to eighteen hours (848-849). That he recalls no investigation about it (849-850); that the Sheriff does not recall when he next saw the copies of the tapes (853); that he cannot be positive or specific but he thinks they were brought back to his office by a messenger from the Journal, they were in a large envelope as they were on large reels (854-855); that he thinks they were taken to court (855) and eventually they were destroyed. That the witness cannot remember which court room he took the tapes into (859). That the newspaper reporter, Mr. Williams, was with Mr. Langley when Langley brought the search warrant to Mr. Schrunk (865).

That he remembers there was some discussion about serving the search warrant (866) but he does not recall specifically what was said. He thinks there was probably a discussion about certain obscene material that was supposed to be used but he recalls no discussion about tape recordings, that he knew that Mr. Clark was

supposed to be either an employee of or representative for Mr. Elkins (868) and that there had been newspaper articles in the Oregonian involving tape recordings (868). That he probably told the newspaper reporter when the warrant would be served (870), that it was "quite usual" to take newspaper men along when executing a search warrant (870). That he was not sure where he met Minielly that evening (874); that he remembers no specific instructions to Minielly (881); that Minielly told him one of the newspaper men was giving him trouble (884); that he was in the Clark house about ten or fifteen minutes (887). That he saw no traffic out around the house but it was reported to him by his wife (887); that there was a partition down the center of the basement and that when he got there the doorway in the partition was open (888-889); that at the time the two telephones, two short lengths of wire and head sets (897-898) were taken by him, he could not say from looking at them whether they were illegal or not or had been used in the commission of the crime (898). That he decided to make copies before he had heard the tapes simply because of the slips of paper he had read (902). That he thought the public was entitled to the facts and his job was to preserve the evidence (902-903). That he did get legal advice about it but it was while the copying was being done (904). That the copying was done on two separate occasions (904). That the Sheriff keeps tax money in the Court House in the safe but that the Sheriff did not feel his own personal safe was secure enough (906).

That on the 8th floor of the Court House is the Criminal Department of the Sheriff's office with a jail which is on 24-hours service (907) but he felt the Oregon Journal was a safer place for the tapes than his office on the 8th floor where there were 24 hour guards (908). That he took no receipt from the Journal for the copies and that he delivered the copies to the two reporters (909). That he does not recall any specific instruction not to make additional copies (910-911). That the Sheriff has learned that additional copies were made (912).

The Court sustained an objection to the question of from whom he got legal advice concerning making of the copies; that he did answer that it was not the District Attorney nor the Attorney General; that the witness first called the FBI on Monday, the 21st (918); that the witness personally destroyed copies by burning them in the fireplace at his home (920). That during the noon hour the witness had refreshed his recollection and the court to which he took the copies was that of Judge Lonergan on September 11th, 1956 (921). That the Minifon in court appeared to be the same Minifon the Sheriff had turned over to the Attorney General (927). That there was a serial number 12271 on the Minifon (928) but that the serial number on the receipt given the Attorney General and given Mr. Clark by Mr. Minielly was for No. 19838. That the witness made no attempt to check the serial number on the machine but thinks there was a mixup in numbers (928-929). That he thinks the Minifon in question was the one turned over but that probably the

wrong number was copied from the receipt. That raids such as this within the city would normally be handled by city police (937); that the Sheriff is the logical one to handle it outside the city limits (937).

That when the tapes were copied they were full and complete copies and not excerpts (942). That Mr. Schrunk did not give Mr. Langley information concerning the contents of the tapes (948). That he never took the copies of the tapes to Judge Mears' court (959-960). That he does not recall whether he personally brought the tapes into Judge Mears' court or not (966). That he knows it was reported that the Minifon belonged to Captain Brown of the Portland Police Department (970) but that he does not know whether or not it did in fact nor does he know who did own the Minifon (970-971).

Defendant objected to holding night session (975).

Witness McColloch, a bank clerk, identified Exhibits 22 sub-letters, 23, 24, as being records signed by the defendant Clark (979-981).

The witness Ennor, a license inspector for the City of Portland, identified Exhibit 25 as being a license application signed for a city license (991).

A Mr. Ross identified Government's Exhibit 26 as being a business record signed in the name Raymond F. Clark (998).

The witness Kelleher identified Exhibit 27 as being an application for employment, signed Raymond F. Clark (1004).

Witness Davis, an F.B.I. agent, qualified as a handwriting expert (1031) and was permitted to testify that in his opinion the script handwriting on Government's Exhibits 4-B, 1-B, 2-G, 2-E, 2-D, 2-C, 2-B, 2-F, 3-B was written by the same individual who wrote the Raymond F. Clark signatures on Exhibits 22-A, 22-B, 22-C, 22-D, 24, 23, 25, 26 and 27 (1032) amplified by his answer on 1034, and Exhibits 25, 26 and 27 were then received in evidence (1035-1036 and 1041).

The enlargements (X, Y & Z exhibits) were identified and shown to the jury and the enlargements were received over objection (1050). The questioned documents read to the jury (1059 to 1063) after counsel had objected to the witness referring to them as the "documents found in the reel" (1055-1058). The witness stated he was not giving an opinion as to whether Exhibits 1 to 5 were original compositions or copied from some other document. The witness looked at defendants' Exhibit 28 and stated that on the back appeared to be written Walter H. Evans, Jr. but that the witness was sure that if he had signed his own initials on the back of the tape he would be able to identify it.

The witness Howlett, a Deputy District Attorney (1089), that the witness received the slips and Exhibits 1 to 5, from Mr. Minielly (1097) and took them to Mr. Langley's office "eventually." That in Mr. Langley's office they searched for the conversation between Mr. Sheridan and Mr. Langley and then found the conversation between Mrs. Anderson and Mr. Langley and

that the witness and Mr. Minielly took the tape machine and the tapes, three boxes, to the Grand Jury (1097). That one of the reels of tape went all over the floor (1098). That the witness Minielly took all but one of the tapes down to the hearing before Judge Mears and that after the hearing in Judge Mears' court the witness and Mr. Lonergan got the tapes from the Grand Jury room and put them in the District Attorney's safe. That he next saw the tapes on Thursday morning when at least the boxes were there. Then he saw them on Friday morning when he got them out of the safe and returned them to Mr. Minielly. That the witness did not mark the tape (1113) nor the reel (1113) but he knows one of the tapes was all tangled up (1114-1115). That at the close of the hearing on Wednesday he went right upstairs and with Howard Lonergan put the tapes in the second shelf of the District Attorney's safe (1118).

That the next morning when he got the Minifon out he saw the boxes there but he did not know whether the tapes were inside (1119) and that he did not see the tapes again until at the time of his testimony. That the conversation that he heard between Dorothea Anderson and Mr. Langley came in loud and clear and he recognized the voices. That when the tape recordings were handed to Judge Mears there were only four recordings and five boxes (1130). The witness identified Government's Exhibit 30 and it was admitted as part of the Government's case against Clark (1136).

The next witness was Mr. Lonergan who was at the time of the raid the criminal deputy for the District

Attorney, Mr. Langley (1148). He had seen and had custody of the tapes during some of the time they were in the District Attorney's office (1161-1164); that on Thursday morning, after Judge Mears' ruling, the witness told Deputy Sheriff Minielly he did not have authority to deliver the evidence to anyone and that Minielly became upset (1167) so the witness opened the safe, looked in, and told Minielly "they're gone, I don't know where they are" but that in fact they were sitting there at the time (1167). That the witness had heard some tapes in Mr. Langley's office of the conversation between Mr. Langley and Mrs. Anderson but that he later learned that what he heard were copies (1177). That when Minielly asked him for the tapes, he, Lonergan, deliberately made a misstatement of fact to him (1187) because he didn't want Minielly to be under responsibility to take some hasty action; that he did it so Minielly could relieve himself of responsibility with the magistrate (1188) by reporting to the Court that the tapes had disappeared which was a deliberate misstatement of fact on Mr. Lonergan's part (1188) and that he felt this was in the performance of his duties as a Deputy District Attorney, a member of the Bar, and an officer of the Court (1188).

The witness Claude Cross, a lieutenant in the State Police (Vol. VIII) that the witness first saw the exhibits when he received them from the Sheriff on May 28, 1956, and he took them to his office in the OLCC Building, and then on the 4th of June engaged a safe deposit box at the State Bank of Milwaukee and that he and Captain Gurdane had the two

keys for the safe deposit box. That they were removed and replaced by him on various occasions and on each occasion were put back in the box and were not altered in any way. That the witness had also heard portions of the exhibits in the presence of Mr. and Mrs. Brad Williams, Mr. and Mrs. Clyde Crosby, a Mr. Douglas Baker, and an unidentified man, at which time Mr. Crosby was making copies or attempting to make copies of the tapes and that this occasion was at the home of Brad Williams (1122-1123) and was in the last of May, 1956, probably the 21st of May and carrying over to the 22nd of May (1124) and that he also had heard what purported to be copies of the tapes on May 19th, 1956, at the Oregon Journal Building.

Captain GURDANE of the Oregon State Police had the other key to the safe deposit box and on August 13, 1956, showed them to Ronald Sherk, an F.B.I. agent. And on September 5th, they were taken by Mr. Sherk (1248). That it was only because of the search warrant that Captain Gurdane permitted Sherk to pick up the exhibits (1250); that he dispatched Lieutenant Cross to Williams' home in response to a telephone call from Brad Williams (1250) and to the Journal Building in response to a call from the Publisher of the Journal (1251).

Mrs. ANDERSON (1255) was a legal stenographer in the District Attorney's office acting as Mr. Langley's secretary. That she saw the slips and heard some of the tapes played in the District Attorney's office on May 22, 1956 (1256-1257). That there were no alterations or tampering with the tapes that she knew of (1263).

Witness DARBY was a state policeman who played the tapes while they were in the custody of the State Police and that there was no alteration or tampering with them while in his possession (1270). That the State Police made a copy of all tapes in its possession (1278). The witness was unable to identify two of the reels (1282) for he could not find the identifying marks on them (1283).

Mrs. ANDERSON, when recalled, stated that she had heard the recordings played in court and recognized Mr. Langley's voice on them and that she had first heard the recordings she recognized in Mr. Langley's office on May 22nd, 1956, and that the other party to the conversation was the witness, and that she recalls having the conversation in its original form and recognized the subject matter of it and that the original conversation took place on the telephone (1287-1288) and that it occurred in 1955 probably in August, that Mr. Langley called her, that she heard it again when it was played during the instant trial and that it was the same conversation; that on either of the occasions when she heard it her voice seemed to be in the background and Mr. Langley's voice was loud and clear; that she never consented to a recording of that conversation being made nor did she give permission to any one to intercept or divulge that conversation (1291) or to use it for their own ends (1292) and that she did not have knowledge that the original conversation was being recorded or intercepted (1292).

LONERGAN was recalled (1296), identified defendants' Exhibit 35, and stated that he took part in the hear-

ing before Judge Lonergan. The Court admitted an indictment against the witness Lonergan which was offered for the sole purpose of showing motive or bias (1300-1325); that the witness had previously heard copies of the tape on the 19th of May, 1956, and not on April 19, 1957 (1238).

Mrs. ANDERSON, recalled that upon reflection the first time she heard the tapes was on the 22nd of May, 1956; that she was requested by Mr. Langley to put the tapes on the machine on Saturday, May 19th, but that she did not stay to hear them. The witness Anderson's husband was a member of the Teamsters Union (1351). The witness was an ex-F.B.I. employee; that the witness typed up the search warrant (1358); that she went to the office the morning of Saturday, the 19th, in response to a specific telephone call to play the recording (1360); that she heard the tapes on a later occasion (1366). That her desk was in Mr. Langley's private office (1370); that she later learned that the recordings she played on the 19th were copies (1384) and that it was on the 19th of May but that she paid no attention to the conversation (1384).

Mr. LANGLEY, the District Attorney, was called as a witness; that he saw the slips of paper (the B, C, D, F and G Exhibits) (2125) the day the matter was presented to the Grand Jury; that Mr. Langley recognized side 1 of tape 1, conversation 1, as being a conversation between him and Mr. Maloney by telephone; that there was no authority given to anyone to record or intercept it; Mr. Langley similarly identified other conversations (Vol. IX). The conversations

were identified by him at pages 1402, 1403, 1405, 1407, 1408, 1410, 1411, 1413, 1414, and further testified (page 1417) that in the last of October or early November 1955 the defendant Elkins came up to the District Attorney's house with a typewritten transcript of some conversations and that one of them (referred to as Reel 2, side 1, conversation 1) was included in the transcript; that the conversation with Elkins was that he handed the transcript to the District Attorney and said he had some tape recordings. The District Attorney said he wasn't interested in hearing them; that Elkins said "Well, it cost him \$10,000.00 to get this material" and that the District Attorney said, "Well, don't blackmail me and go on and leave." (1418). He also identified conversation Reel 2, side 1, conversation 13, as being on the transcript shown him by Elkins. The District Attorney then identified the voices of Tom Maloney and Joseph McLaughlin (1421) and that the conversation between Maloney and McLaughlin was on the transcript shown him by Elkins; that the District Attorney first became acquainted with defendant Elkins about 1938 and that Elkins had come to his house in the summer of 1955. Mr. Langley then continued to identify voices (1428) and identified another conversation as being on the "Elkins transcript" (1429).

On cross-examination defendants played Defendants' Exhibit 13 for identification for Langley and he stated he could not identify his voice without knowing the conversation and that it was not his conversation (1434); That he did not hear Maloney's voice nor McLaughlin's voice; the witness then stated he had no independent

recollection of answering certain questions while testifying in Washington, D.C. On the last half of Defendants' Exhibit 13 for identification, the witness stated that he did not have the conversation on the recordings but that he could not answer as to whether or not that was his voice. That the District Attorney had seen Elkins in 1947; that Elkins had never paid him any money; that although a bill of sale to the fixtures of "the China Lantern" had been in Mr. Langley's name, actually Mr. Langley was doing it only as a lawyer and had no beneficial interest in it; that the woman for whom he was acting was a Virginia Miller and it was sold to Chinese people; that after looking at the exhibits (Defendants' Exhibit 39) that the lease on the China Lantern was in his name from June 28 to August 12, 1949; that the District Attorney thought Elkins owed him some money but not on a legally enforceable claim for attorney's fee for representing a man named Snyder; that the District Attorney was at Mr. Maloney's apartment on three occasions (1455); that he first met Maloney while attending an annual gathering of the Teamsters Union in Seattle in December of 1954 (1458) while there as a guest of a lawyer who represented the Teamsters (1458); that the Teamsters paid for his hotel room and that he relied partially on Maloney to supply him information concerning the location of houses of prostitution (1460) which, of course, was after he had been elected District Attorney.

And that he paid Maloney a total of about \$1200.00 (1460); that Mr. Maloney was in the District Attorney's home numerous times; that he first met Joe McLaugh-

lin in the Portland Towers in March or April of 1955 and that McLaughlin came to the District Attorney's office once or twice and that he was friendly with McLaughlin. That the word "the character" was a nickname for Mr. Elkins (1466); that his only relationship with Mr. McLaughlin was as friend of Maloney and that he absolutely had never received money (more than \$5.00) from either Maloney, Elkins or McLaughlin in the presence of any one or more of the others (1468-1469); that he had been to Elkins' office once or twice; that he did not know how long he had known Virginia Miller before he took the lease but that he had known Mr. Butler for maybe six months before that (1472); that he regarded himself as being the lawyer for another lawyer (1445); and that as he recalled Mr. Butler was holding some diamonds as security for the lease transaction; that the District Attorney did not see Mr. Elkins between being in his office in 1949 and Elkins coming to his house in the summer of 1955. That Elkins had the original letters which the District Attorney had written to the Chief of Police (1479); that this call at the District Attorney's house was about five or six in the morning and he believes it was a Sunday; that on Elkins' second visit he came to the door on a Sunday, the District Attorney does not remember the weather (1488) and Mrs. Langley admitted him. The District Attorney was watching a professional football game on television. That Elkins handed him a transcript and said "Read 'em" (1492). That he thinks there were about ten pages and that it took the witness about 20 minutes or a half an

hour to read them (1493). They were single spaced letter size typewritten. That he remembered quite a bit of the conversations that were on the transcript (1494-1497); that there was something about "cutting around the District Attorney" which the District Attorney understood to imply that Maloney was "dealing behind his back" (1497). That after Langley read it, he said "That's a lot of trash" or words to that effect, and that Elkins told him he had the tapes in the car but the District Attorney said he did not want to hear them; that Elkins said it would cost him \$10,000 to get the material, and that Langley told him not to try and blackmail him, but Elkins did not directly ask him for \$10,000 but that that was the implication the District Attorney put upon it (1501). That he told his wife about it and (from page 1503) "there had been lots of discussions between she and I about Elkins and the difficulties I was having" (1504); that he did not file a complaint against Elkins; that his wife later told him that he (Elkins) had been to see her and that Elkins had played a tape recording for her and that she told the District Attorney the voices sounded like his and that one of the conversations was the one in which the District Attorney was talking to Maloney about some Chinese men. That (1514) when Elkins brought the transcript, Elkins had a snub-nose revolver in the pocket of his jacket; that he pulled it out slightly so he could see it; that he had referred to Elkins as an ex-convict and that it was an offense in the City of Portland for an ex-convict to carry a firearm but that as District Attorney he did nothing about Mr. Elkins'

carrying one; that the District Attorney did suggest that Mr. Elkins be arrested for violation of a traffic ordinance and then be searched in connection with that arrest and then if they found a gun on his person to charge him with being an ex-con in possession of a gun (1517); that the District Attorney had had a narcotics warrant issued against Elkins—a detention warrant (1518) based on narcotic addiction and that he asked the State Police to serve it but he did not ask the Sheriff to serve it although the Sheriff came out with a public statement that he'd be glad to serve it. (1524) Renewed objection about holding court at night.

That before the District Attorney had been elected he had been an Assistant United States Attorney for the District of Oregon; that he had had contact with the F.B.I. and that although he knew that the Elkins transcript contained intercepted telephone conversations of his which he had not consented to and that this constituted a Federal violation, he did not complain to the F.B.I. that Mr. Elkins had brought up to him a transcript of intercepted telephone calls (1530). He did state he had reported generally that his phone had been tapped and that he felt the F.B.I. could not protect his family as that was not their responsibility and that the Oregon State Police didn't want to come in and help straighten up the situation and that the Sheriff's office functions outside the city and that the City Police he thought were controlled by Mr. Elkins (1530-1531). That he did report to the F.B.I. that his telephone had been tapped but he did not name Mr. Elkins as the person he suspected; that the F.B.I. told

him they wanted "some substantial evidence that Mr. — a particular individual" (1532) had tapped his wires and that the telephone company could find no evidence that the phone had been tapped and that when he told the F.B.I. this "there wasn't any basis from which they could address a communication to their Washington office"; he doesn't know whether he mentioned Elkins' name in connection with the wire tapping or not (1533). That the afternoon of the search warrant the subject was first brought up by Mr. Williams (1537) who told him he had information as to obscene pictures (1537-1538); that they were anxious to get it done that evening (1539-1540) but the witness did not recall whether or not the fact that Friday, Saturday and Sunday were all non-judicial days had anything to do with the decision to get the search warrant Thursday (1541); that Brad Williams first talked to him about 3:30 but that they spent quite awhile on research before calling the Judge to find out whether or not they had sufficient grounds for making an application for a search warrant (1542); that the witness was not sure whether or not an affidavit made on information and belief established probable cause and that the source of his information was the Chief of Police at St. Helens and that he overheard the Chief of Police telling Brad Williams about it on the telephone by listening on the telephone extension (1544); that the source of his information was by eavesdropping the conversation (1548); that after he personally delivered it to Mr. Schrunk and that he doesn't think there were any special instructions or discussion about tape recordings at the time the search warrant was handed to Mr. Schrunk (1553); that he had talked

with Williams about tape recordings but not in connection with Clark; that there was a discussion about a possible connection between Elkins and Clark (1555); that Mr. Williams, the Journal reporter, was the one who had come to him with the information (1556) and that on Saturday probably the Journal brought up the tapes (1560) (on May 19th); that there were five or six reels (1563); that the listening session lasted all day (1567); that the witness does not know whether he was the author of the letter purportedly signed by him and read to the State District Judge on the State motion to suppress proceedings (1578).

That the witness had previously testified that the visit from Elkins occurred in the latter part of October, 1955 (1595); that the witness thinks he told Drew Pearson that the visit was in the last part of October or the first of November and that Drew Pearson stated it was three months after the July 1955 visit and the Court sustained objections to deefndants' questions as to whether or not Mr. Langley had made different answers in Washington, D.C. before the McClellan Committee than those testified to during his direct examination; with respect to Elkins' demand for \$10,000 (1604) the matter was presented out of the presence of the jury (1603 to 1607) and a similar objection to the question as to whether or not he had made a different answer to the question as to what conversations he had had with Brad Williams that preceded the search of Ray Clark's home and the same objection to the same question relating to whether or not he had copies of the tapes at the time of Senate hearing (1610).

Langley had consulted Mr. Santoiana of the F.B.I. and told him here were transcripts of Langley's conversation in existence (1612) but doesn't think he used Elkins' name. That he had complained to the telephone company about possible wire taps, that he had secured a photostat of his letter of May 18, 1955 (1615) but that he thinks that it might have been misdated and sent on the 19th rather than on the 18th and he was unable to say whether the letter was based on his personal information or information he received from Mr. Lonergan or some other person but he was still sure that he did not hear the tapes until the 19th of May; that he was under indictment in a case in which Mr. Elkins was a witness appearing against him (Exhibit 46, page 1617); that the tapes he heard on May 19th were the Journal copies (1623) and that he did not hear the original tapes until May 22nd (1620); that the District Attorney put flood lights around his home but that the visit from Elkins was not the sole cause of it (1632-33); that the witness Maloney had worked for him for about from January 1955 to March of 1956 but as far as receiving any compensation it would be from April 1955 to March 1956 and that Langley believed Maloney was in error if he testified he stopped in December 1955 (1634); that the District Attorney paid him a total of about \$1200.00 (1635) by check and by cash; that the District Attorney had used Mr. Maloney as an investigator to dig up a key witness in a murder case (1643-1649); that he was not disturbed when he saw the newspaper's story that the tapes were missing from the District Attorney's safe (1655) and that he

never discussed the matter with Mr. Lonergan, his chief criminal deputy; that the witness signed the transfer of the lease to the China Lantern (1658); on further cross examination Langley stated that he recalled the conversation he identified as being between him and his secretary, Dorothea Anderson, and he recalled there was no particular beginning to that conversation; he is not sure where he was located when the conversation was held nor does he know where Dorothea Anderson was except for what Dorothea Anderson stated; that he did recall Dorothea Anderson's laughing in the conversation and he recalled that in the conversation he said "Gosh darn you people" (1668-1669); that by "you people" he meant some others in the office that he had been discussing the problem with; that as District Attorney he operated on a factual basis rather than a personality basis (1671); that if they did not have the facts they would not prosecute and that is the way he felt about Mr. Elkins—nothing personal (1671) and that's why the District Attorney suggested that Elkins be picked up on a traffic charge and then if they found a gun upon him he could be committed to the Oregon State Penitentiary for life in prison (1671) and that after his memory was refreshed he did recall suggesting this to the State officers (1672); that he didn't phone the Deputy Sheriffs when Elkins left his house with a gun in his pocket (1672-1673); that the Deputy Sheriffs didn't have any authority within the city (1673)! When asked what the Deputy Sheriffs were doing executing the search warrant on May 17th in the City of Portland if they had no such authority

he explained (1673) that if the District Attorney had called the Sheriff to complain about Mr. Elkins the Sheriff would have told the District Attorney to call the city police (1673-1674) but that the reason he called the Sheriff to execute the State search warrant was because the matter had been presented to the District Judge (1674) and the witness suggested that counsel for the defendant was pettifogging by asking the District Attorney to explain this answer (1675); the witness listened to some of the conversations on the Government's exhibits and thought he recognized his voice (1683) but did not know where he was phoning from (1685); that Mr. Maloney was not an investigator for Mr. Langley (1692) but that the District Attorney had merely purchased information from him; that in his opinion the conversation between him and Dorothea Anderson was an intercepted telephone communication (1695) but that he did not know where the point of interception was (1695) and that he infers it from the circumstances of the conversation, i.e., where he believes he was and where he thinks she was and the means of transmitting the sound (1696); that he could not understand why there was suddenly no background noise in the middle of his conversation to Mrs. Anderson. Further indictments of the District Attorney were received as evidence of motive or malice (Exhibits 48, 49 and 50) (1705 to 1706), one being an indictment for a conspiracy to commit the felony of hindering and obstructing public justice, another for incompetency, corruption, malfeasance, etc. together with a judgment of conviction for neglecting to prosecute (ORS 167.505) (1725).

The next witness was JOSEPH McLAUGHLIN (1728) who lived at Seattle from June to the end of 1955; that he has two sons—one Joseph and one Patrick; that he has never consented to the interception by any person of any telephone conversation nor to any telephone conversation being recorded nor to have any other person divulge any contents of a telephone conversation that may have been intercepted and that he had no knowledge that anyone was intercepting any of his telephone conversations; that in 1955 his son Joe was 15; that the witness refused to testify identifying his voice on any of the conversations (1731, 1733, 1734, 1735).

The witness THOMAS SHERIDAN was called, stated that he was at one time the Administrator of the Liquor Commission and that he was acquainted with Mr. Maloney; he identified one of the conversations as being on the exhibits as being between him and Tom Maloney about the middle of September 1955 and that he did not consent to the recording, intercepting, or divulging of it (1746-7). (Conversation 211 the same as to conversation 217, dating it in August or September 1955, the same as to conversation two one ten, 222, and that he recalled conversation 315 and did not give consent to its interception, divulgence or use and had no knowledge thereof, and the same as to a later (from the standpoint of position on the reel) recording which was unidentified).

That there were extension phones in the OLCC office (1767 to 1770) and that they have a conference phone there (i.e. turn a button and receive the con-

versation) (1770). On direct examination the witness explained the telephone arrangements in the Liquor Commission (1766 to 1792); that this witness did not know whether any of his calls had been intercepted (1797-1798) nor did he know that any of them had been divulged or used for anyone's benefit (1805); that the conference phone enabled four or five people to participate in a conversation by talking into it as a microphone (1808) and that the District Attorney never informed him that there had been any interception of his (Sheridan's) calls until around May 22 (1811).

The witness FRANZ was called (1818) and he was vice president of the State Bank of Milwaukie and identified the entry record and explained about the keys to the safe deposit box and that box 912 was rented to the Oregon State Police and that only two men were authorized to enter the box, Claude Cross and Vayne Gurdane (1822) and that Ron Sherk was with Mr. Gurdane on September 5, 1956; that Franz knew that Mr. Sherk was an F.B.I. man and that the witness gave Mr. Sherk no indication that he would not comply with the search warrant (1825).

JACK BUELL was a radio-television technician who was called to the District Attorney's office on May 22, 1956 (1830-31) to untangle and rewind some tape and that it took about four hours and that he handed it to someone when he finished but that he did not remember who (1832). That he was working for KPOJ, affiliated with the Oregon Journal in May 1956 (1935). Mr. Buell testified that he remembered seeing Mr. Brad Williams there (1844); that it is comparatively simple to

make copies from tapes and that things can be dubbed in on them or erased (1845) and that under ideal conditions it is hard to tell an original recording from one "dubbed in" (1846), and that although there are electric tests that might show a difference or a copying, the big problem is that you have to be sure you have the original to make any tests (1846, 1847).

MR. NOVAK, the "disc jockey," was called (1849) and testified about going to the court house in the company of Brad Williams election night or early in the morning of May 18th taking a Magnecorder and several boxes of tape; that when he made the copies he played them on one machine and made a single track recording on the other machine (1852 to 1853); that he copied most of them; he thinks he used about eight half-hour reels and that he left with Mr. Williams about 6:30 or 7:00 the next morning; that he thought Mr. Moore, another technician, had made some copies of excerpts the night before (1855) and he also made copies. That he could not tell from looking at the tapes whether they were the same ones or not (1856) as they all looked alike. The witness testified that he thought they were the same tapes because he recognized the label on the reel but it turned out the label he was referring to was the Government's Exhibit mark (1856); that he was directed in his operations of the copying by Mr. Williams and the Sheriff (1859); that he again made some copies of the tapes that afternoon in his studios at KPOJ and they were made from "our own tapes." They were excerpts and he was given these tapes to make copies at the studios (1861); that after

the copies were made they could have been recorded on a home-type recorder and been recorded on both sides and at the three and three-quarters speed (1864) and it is doubtful if they could be told from the originals (1865). That the tapes can be erased by pushing the recorder button or by holding a strong magnet on the tape while it is being run (1865). That it was the witness' recollection when he heard the tapes that there was background noise present throughout all of the tapes in varying levels (1868); that the witness could not understand how there could be background noise during part of a conversation and no background noise under the balance if it was all one conversation (1869). That the witness made no changes or alterations in any of the conversations (1870) and that if there was a "wiretap on the telephone" you would hear the phone ringing as a buzzing sound rather than a ting-a-ling (1871) unless there was both a microphone in the room and a tap on the telephone (1871).

The witness SHERIDAN listened to defendants' Exhibit 13 (and identified one voice as "similar to Langley's"; he couldn't be positive (1876) and that there was a voice similar to Maloney's on defendants' Exhibit 13 (1876). On re-direct he stated he was not positively able to identify any of the voices but that he was reasonably certain the voice was Langley's (1878).

CHARLES MOORE, a radio technician from KPOJ testified that in the late hours of May 17, he was directed by his station manager to get some recording equipment together and go to the Sheriff's office (1880); that he went by the Journal building and picked up

the night editor, Bob Stein, and then went to the lobby of the County Court House where he met two Journal reporters, Brad Williams and Doug Baker, and they waited for Sheriff Schrunk to arrive (1881); that he then set up his tape recording equipment to make copies of some of the tapes; that the copies he made were single track recordings on 7½ inch reels (1882) and the originals were left in the custody of the Sheriff and that the copies were given to the Journal reporters (1882-1883) and that this session ended about 7:30 or 5:45 a.m. (1883); that the copies he made were only excerpts (1883) and that he received his instructions as to what to record from either Brad Williams or Doug Baker; that he did not go back and complete the job of copying and that he made no alterations, additions or subtractions; that he does not recall how many tapes he listened to and copied excerpts from (1892) but his best estimate was three or four or five (1893); that it is possible to make single track tapes and then re-record them making double track tapes from them (1894); that he thinks he ended up with two 7½ inch reels of recordings but he is not exactly sure (1901).

At 1903 the Government offered and the defendant objected to the introduction of Government's Exhibits 1 to 5.

The Court then received the exhibits in evidence (1937) and Mr. Sheridan's testimony concerning defendants' Exhibit 13 was read to the jury.

ROBERT CARTER, the manager of the King

Tower Apartment, was called (1943) and stated that on November 22, 1954, Bernard Kane occupied Apartment 502 and moved out on June 30, 1955. On August 1, 1955, the apartment was occupied by Tom Maloney until October 31, 1955, Apartment 503 was rented to Bernard Kane on August 5th with Kane moving in August 8th and moving out the last of October. The two apartments have entrances alongside each other and are reversed arrangements of each other with a common kitchen wall (1946) with an open way in each between the kitchen and living room. That after an article appeared in the Oregonian in early 1956 he made a search or examination of Apartments 502 and 503 by removing the kitchen cabinets (1947) and he found in the common wall a hole right below the ceiling height about the size of a lead pencil (1947) (1948), and that about three or four feet along the back wall and two and a half feet along the stub wall between the living room and the kitchen there was a hole scooped out in the wall back of the kitchen cabinets about the size of a saucer which sloped down to the size of about of a bottom of a teacup and that on the living room side of this wall in 502 there were about 18 pin holes through the wall paper. The application blank for 503 and for 502 were marked and they were received without objection (1953); that each apartment in the King Tower has its own phone and that Mr. Maloney had his phone—non-listed phone (1955). That there was no switchboard phone in the apartment or rooms (1961) and that there was only one phone in Mr. Maloney's apartment and that the wires from

each phone went down the raceway with most all of the raceways on the outside wall (1961) down to a central terminal block which the phone man had access to and which was locked. That he had no knowledge of Mr. Maloney's phone being tapped at any time during Mr. Maloney's occupancy (1962); that Maloney gave his occupation as an organizer for the Teamsters Union; with one of his references being Clyde Crosby (1963-1964); that the raceway or phone box in the Maloney apartment was located on the window side of the building at the west end (1973) about ten feet from the hole common to the two apartments and about five feet across an opening between the kitchen and living room. The witness drew a diagram of the two apartments (Defendants' Exhibit 57) showing the common wall between the two kitchens and locating the phone raceway on the outside wall (1977); that the hole in the stub wall between the kitchen and living room was about the size of a cup (1978) and that the apartment 502 was furnished with the phone sitting at the breakfast nook table would be within a few feet of the hole in the wall; that the phone had a long cord (1979); that the witness believes the raceway in the wall served an apartment on each floor, i.e. 503, 603, 703 (1980) and the exhibit was explained by the witness and received in evidence (1983); the witness further stated that the large hole in the wall between the witchen and living room was about six feet off the floor (1986); that he had no information as to who made these holes (1986); and that the cupboards were continuous around the wall of the kit-

chen from the back of the large hole to the pencil-size hole between the two apartments (1987) and the witness also admitted that there had been a little disturbance over giving a key to the telephone terminal box in the basement to law enforcement agencies (1987-1988); and that the witness had never seen either of the defendants in King Tower and on re-direct that the law enforcement agency referred to was the Portland Police Department; that since 1955 they will permit no one to go into the box unless he shows his identification card (1992); that the wall between the two apartments is a wire-meshed plastered wall (1993) and that the outside wall is a 9-inch cement wall but with a false wall approximately three inches in with plastered wire mesh (1995); that the witness actually does not know what Government law enforcement or police officers did or did not listen to telephone conversations on the occasion when the key was given to a Portland Police intelligence man (1996).

BERNARD KANE testified he was employed by the defendant Elkins (1998) and that he was a bachelor in November of 1954 and that he rented an apartment uptown at Elkins' request (2000); and that he lived in 502 and Mr. Elkins used it occasionally; that Mr. Elkins was paying for it during this period of time and would use it to rest in and that Mr. Elkins told him that he felt better after about six months (2001) and said that he did not wish to keep the apartment any more but that if Kane wished to pay for it Kane could keep it and that Kane did not think he could afford it so he moved out to his old boarding house (2201); that he filled out

Exhibit 53-A and on August 5th made application for an apartment and that Mr. Elkins asked him if he would get another apartment down town and that the witness believes he asked him if he wanted to be in the same place and that Elkins told him "yes" (2002); and that Elkins said "see, if you can get Apartment 502" and about four or five days later they did tell him he could rent the apartment and that he picked up the key and delivered it to Elkins and never occupied it himself but that Mr. Elkins paid the rent on the apartment (2003); that the witness got married on the 4th of October and left his employment by the Service Machine Company and gave notice on the apartment, returning the keys, which he picked up from defendant Elkins (2005); that the reason he left was to make more money; that Elkins had a home during this same period of time and that he had a telephone when he was in Apartment 502 (2006); that the witness thought he wanted 503 to have a place to meet people and to rest (2007); that he never actually saw Mr. Elkins in 502 but assumed he used it since the witness was gone from early in the morning until late in the evening.

JAMES JENKINS was called as a witness and refused an answer certain questions; that he was not employed by Mr. Elkins at that time nor a month ago nor six months. It appeared that the witness' attorney had been waiting in Court but had temporarily gone at the time the witness was called to the stand (2010-2013) and the Court finally continued the matter until the witness' attorney could be present.

MISS ERICKSON, a public stenographer, was called and testified that she was employed by Mr. Elkins on November 18th, 1956, as a public stenographer (2016). The defendant Elkins objected under the Oregon statute extending privilege (2016-2017). The Court initially sustained defendants' objection (2018) and the witness was excused.

MR. SWANK, supervising special agent with the telephone company, who produced the phone records for Apartment 502, including toll records or long distance calls. That the telephone in apartment 502 at the King Towers was installed August 2nd, 1955, for Tom Maloney and disconnected November 3, 1955 (2027) with the phone number originally AT 4551 and then a change two days later to AT 1707, an unpublished number, and on Labor Day when Portland went to a five digit system, the number was changed to CApitol 8-1707. Mr. Swank read the record of the long distance calls (2029 to 2030) and stated the record indicated one hand set with a 25-foot cord and that each time a tenant changes it means a new instrument, a new telephone (2031) and that it would not be left unless the service man felt the station was in good working order and would serve the new customer (2031-2032); that the record on the original installation indicates a 500-D telephone (2032-2033) which would be one with a volume control on the bell; that the telephone lines do connect to interstate lines through the medium of exchange between states (2034); that when complaints are made about the way a phone works, the complaint is taken down together with the address and

phone number and placed on a line card, and the line card is usually maintained until the number is disconnected and there might be a work order resulting from the line card; that the witness had examined the line card for the Maloney phone (2038) and found no record of any complaints; that the telephone bills were billed to Mr. Maloney, care of the Teamsters Building Association in Portland, Oregon, and that the records indicate they were paid.

On page 2042, the Court called counsel's attention to Rule 26 of the Federal Rules of Criminal Procedure.

The following morning the Government renewed its motion to permit Mrs. Erickson, the public stenographer, to testify and the Court, after argument, held (2051) that this being a criminal case, it was bound by the common law and that there was no privilege between the secretary or scrivener and an employer and that therefore the Government could produce the evidence. Defendants excepted to such a ruling (2052).

The witness was called for preliminary testimony out of the presence of the jury (2053) to (2115) and then in the presence of the jury and over defendants' objections (2045-2053), (2060), (2065), (2075).

We think a fair summary of Mrs. Erickson's testimony to be that she was handed an affidavit form and made certain changes in it, of which changes she has records in her notes, that after these changes were made there were still further changes made in the affidavits and they were then signed and that the defendants

would not sign them in the form in which her notes indicate, and that she does not recall what the other changes were. Her notes concerning the defendant Elkins' affidavit has reference to the phrase "telephone rings or telephone recordings" (2067) that it was signed and notarized after it was completed (2073).

"Affidavits" (which were carbon copies of unsigned affidavit forms) were marked by the Government 59 and 60. The witness testified she was sure that these exhibits were not typed on her typewriter (2059, 2060); that most of the dictation was made by Mr. Dodd (2066); that after the witness read her notes (2068 to 2072) Government Exhibits 60 and 61 were marked for identification as being the transcript of her notes. The only testimony as to Mr. Elkins' reaction was (2092), "Well, I believe he was just relying on Mr. Dodd's legal advice. I frankly don't know" but that he seemed to be in accord with what was being said (2093). Mrs. Erickson was then recalled in the presence of the jury and her testimony repeated (2115, et seq). The witness' notes indicated that she received dictation to the effect that Clark, working for Elkins, was in charge of "taking tape recordings . . . in apartment 503, King Tower . . . the instruments being located in apartment 503 and recording from a wall tap in the partition between the kitchen and the living room located approximately six feet off the floor in apartment 502 in said apartment building.

That there were certain perforations in the wall that permitted the entry of sound from that apartment which we recorded from day to day, . . ." (2182); and

again that an affidavit form was dictated for Elkins which stated in part (2136), "A note that it is page two of the draft and the words 'inserted telephone rings or telephone recordings'." That there were additional changes made in the documents before either Elkins or Clark signed them (2142). That her impression of the discussion about telephone rings was (2144) "Well, I had the impression that it was a matter of these wall recorders picking up the sound of a telephone ringing over here and the sound would be heard if I were speaking on this end and my voice was being carried to the tape recorder or wall recorder wherever they are . . ." That there was no conversation about telephone taps or interception of telephone communications in her presence (2167).

JAMES JENKINS was called and declined to answer any substantial questions on the ground that his answer might tend to incriminate him (2175-2176).

CLYDE CROSBY was called (2178) who stated he became acquainted with the defendant Elkins in the middle of 1954 and that during 1955 Elkins called on him twice. The first being friendly with the defendant appearing in his capacity as contractor and the second one was in the Fall of 1955 (2179) at which Elkins stated that he had some tapes that were damaging to Teamster officials (2180) and that he brought a recorder in, took them into Crosby's basement, and played them (2180). That he listened for more than two hours (2181) and that he told Crosby that he (Elkins) had paid \$10,000.00 to have them burglarized; that his wife

and children were home when the tapes were played (2183); that the tapes were chiefly conversations. The witness Crosby then stated that of the conversations on Government's Exhibits 1 to 5 that he heard (identified by exhibit, side and conversation number) conversations 2-1-1, 2-1-3, and unidentified conversation (2187), 2-1-7, 2-1-9, 2-1-13, 2-1-14, 2-2-1, part of 2-1-14. He did not know as to 2-2-2 (2192-2193). He did recall hearing 2-2-3 (2193). He did not remember 3-1-3 (nor 2-2-2 nor 3-1-1 nor 3-1-3, but he did hear 3-1-5; that he did hear 5-2-1 and that there were two different ones that he heard at his home (2197), one being a conversation between Crosby and Maloney (2197) and that it was a call about Mr. Maloney knew that Crosby was going to call on the Mayor and Maloney asked him to put it off and that he recalled the conversation although he did not recognize his voice.

The Court, over objection (2199), permitted the witness to answer questions concerning a conversation which was not in evidence but which the witness stated he had heard in which he did not recognize his voice but if it was his voice was a telephone conversation (2200). Ruling on 2201.

The witness then volunteered (2201-2202) that there was another conversation relating to John Sweeney which was stricken by the court on page 2203.

On cross-examination the witness testified he was International representative for the Teamsters (2205) and that in 1954 he was Executive Secretary of the General Teamsters local in Portland; that Mr. Sweeney

was first International Representative (Crosby's present job) (2207) and then appointed with the Western Conference of Teamsters (2207). That Mr. Maloney came to Oregon with the idea that he could be of service to the teamsters politically (2209) and as a result of this the witness authorized some expense money for Maloney in recognition of what the Teamsters thought was a service to their organization (2209); that he was not considered an employee; that he learned that Maloney was an undercover man for the District Attorney's office sometime prior to Maloney's leaving Oregon (2210); that the witness did not remember meeting the defendant Elkins at the airport (2212) but that he did remember that Mr. Sweeney and the witness got off an airplane and Mr. Elkins was on the sidewalk talking to Mr. Sweeney (2213); that the men who service pinballs in Seattle and San Francisco are within the Teamsters jurisdiction (2215) but the activity regarding Elkins in the pinball industry took place after the witness Crosby had taken Sweeney's position (2214). That the first time the witness met Joe McLaughlin was in the Teamster Building in Portland (2217); that the witness has known Mr. Langley since 1954 when Langley came to his office and asked for assistance (2217); that the next occasion that he can recall meeting the defendant Elkins was when Elkins appeared at the Teamster Hall to talk about politics (2219) and that he remembers Elkins visiting his home when "the basement work was being done," probably in early 1955 (2220-2221). That he remembers the witness Jenkins (2222) as doing some work (2221 and 2222); that the con-

tract was arranged by the witness Maloney (2222 and 2223); that the witness paid the defendant Elkins nor his company nothing (2224) but that he paid Mr. Maloney for it in cash and did not get a receipt (2224) and that the amount was \$200.00 (2225) and that his original arrangement was with Tom Maloney that Tom Maloney would fix up his party room in his basement for \$200.00 and that he didn't know who would do it or who did it until later he found it was the defendant Elkins (2225-2226); that he got two slot machines from Malone (2226) and that they were a present and that he did not inquire where Maloney got them; that there was no mention of paying the defendant for them nor any knowledge that they came from defendant (2226-2227); that the witness did not believe he had called Elkins' office or his company to ask them to hurry up on the job (2228); that when Elkins brought the tape recordings it was probably in February or March or possibly early April (2229) and that it was dark (in the evening)—(2229). That the witness stepped out on the porch and talked to Elkins when he rang the doorbell (2229-2230) and that Elkins brought tapes into the house (2231). That he had a clear recollection of what Elkins said (2231) and that it was (2232) that he had some tapes he wanted to play for Crosby and that in Elkins' opinion they were extremely damaging to Teamster leaders (2232); that Elkins got his tape recorder, brought it into the basement, and that it looked like a ladies' suitcase (2233); and that he does not remember the color of it nor the make or name of it (2233); he described the situation

in the play room and the position of the parties (2234, 2235, 2236); that the witness made wire recordings at Brad Williams' home on May 21st and 22nd (2237); that they drank one pot of coffee and possibly more than one (2239) while they listened to the recordings; that Elkins was there two or two and one-half hours (2239, 2240); that Elkins told them the tapes had been stolen from an office (2241) but the witness did not ask which office; that when the recording were played they were played well enough that the witness could identify voice (2243); that his wife probably knew what they were doing (2243); that the witness thought he recognized the voices but did not want to be in the position of identifying them (2244); that the witness thought he recognized the voices the night they were played for him (2246) and he thought he recognized Maloney's without any question of a doubt—he believed he recognized Langley's generally from the characteristic timber and tone (2246); that he thought he heard McLaughlin's voice or a reasonable facsimile and Sheridan's voice (2247); that he was acquainted with Mr. Sheridan at that time ; that he does not recall whether he heard that same conversation (223) relating to Ron Moxness at Mr. Williams' home or not (2247, 2248); that the witness thought he had not identified eleven conversations but maybe about a half a dozen (2255); that on the recordings that Elkins had Mr. Sweeney's voice was recorded (2255); that the most definite date he could give was the Fall of 1955. The Court sustained an objection to the question as to whether or not there was anything the witness heard on the tapes in the

Fall of 1955 that was damaging or incriminating toward Teamster officials (2257).

That the witness thinks Elkins mentioned again the manner in which he obtained the tapes but the witness ignored it and the witness stated that Elkins then said he was "going over my head" (2258).

Crosby testified that he went to Washington on November 2, 1955, and remained there until November 6th (2265). The witness states that when he testified before the McClellan committee in Washington (2268) he stated that "The tapes Mr. Elkins played in my home had absolutely no similarity to those which were played in Mr. Williams' home. They were different types of tapes so far as I can recall. I say different types meaning they were different conversations" but that he did not understand; that he meant there were different conversations he had heard from Elkins that he did not hear in Washington, and that the tapes were of different sizes—on larger reels, and that he may have given the wrong impression but he was upset (2269). That he thinks Elkins had a transcript of certain conversations in his pocket when he visited his home. That the witness further admitted (2274) that when testifying before the Senate Committee he stated that he could no longer recall what he had heard and what he had read (2274) but that the reason was that when he testified he had a bad cold and sinus condition, and the witness again admitted (2275) (2276) that when Senator Mundt asked him if the tapes he heard in his home were the same as those he heard in the home of Mr. Williams, the witness answered "No, sir,

that they were different tapes” and he explained that he was distinguishing between conversations that he could easily recall and that the confusion arose because there were conversations on “Williams’ tapes” that were not on the tapes that Mr. Elkins had and they were on different size reels, etc. (2276) and the witness further admitted (2276, 2277) that in answer to another similar question, he stated, “Well, the answer to that, Senator, is that the ones Mr. Elkins played in my home had absolutely no similarity to those that were played in Mr. Williams’ home, they were different types of tapes as far as I can recall. I say different tapes meaning they were different conversations.” but that he had changed his mind when they were played here in Court (2277); that the witness was then under indictment in the State courts in cases in which Mr. Elkins’ name appeared as a witness before the Grand Jury and that he did not know how many indictments there were against him in which Mr. Elkins’ name appeared as a witness before the Grand Jury (2282). That they were handing them out like confetti (2283); that he has sued Mr. Elkins (2284) (Exhibit 65), (Exhibit 66, 67, and 68) and that he was suing the defendant Elkins and others for \$600,000.00, or more than a million dollars (2288), and counsel for the defendant obtained permission to re-ask a question to which an objection had been sustained (2191, 2192) as to whether or not there was anything on the tapes he heard damaging to Teamster officials and the Court reiterated its former rulings (2292, 2293); that the witness was not able to fix the date of the time he heard the exhibits in the

Williams home (2297); that he was not invited to the Williams home but simply knocked on the door and said he wanted to hear them (2298); that when Elkins came to his house he only had two recordings (2306), i.e. two reels (2306-2307); that the witness recalled one other time when he met Elkins which was in the presence of Sweeney at Amato's (night club) (2315) and that they had lunch with Elkins at a restaurant known as the Prime Rib (2316); that the witness recalls talking to Elkins at least once on the phone relative to Mr. Elkins' sale of the pinball route to Mr. Stan Terry (2320); that he met Mr. Sheridan before the Grand Jury investigation (2322) at the request of a Lieutenant Crisp of the Portland Police Department and that Elkins called him once about the 1954 political campaign; that the witness o.k.'d the telephone bills for Maloney (2326) and that the charges were paid by either the Teamster Building Association or the Joint Council (2326) (2328); that the witness had no regrets when Maloney left (2332) and that the reason the Teamsters continued to pay Maloney's telephone bills after the 1954 election was over was that Crosby had overlooked cutting it off (2334); that the King Tower Apartment did not check with Crosby before renting Maloney the apartment or he would not have o.k.'d it (2338) but that he was neither an employee nor an official of the Teamsters at the time (2339); that after the informal conference with the Senate Investigating Council in Portland the witness told the auditor they were to pay no more bills of Maloney (2348); that Maloney was helping the Teamsters politically but was not working for the Team-

sters (2351); that the witness traveled on the same airplane with Mr. McLaughlin (2355) and the transportation of both was paid by different Teamster organizations (2356); that the witness had heard McLaughlin speak (2360, 2361), conversation 2-1-9 was played and the witness identified the voices as being those of Maloney and McLaughlin, and the witness stated he was sure it was played by him for Elkins in the Fall of 1955 (2368) and that he was identifying the conversations by their subject matter rather than by the sound of the voices (2373); that the defendant Clark had never played the tapes for him, demanded any money or divulged any contents of the tapes to the witness (2378).

Crosby admitted stating publicly that in April 1956 he did not know Joe McLaughlin when in fact he did know him (2379) but that this was done deliberately to try and learn more "the nature of all this stuff was about" (2379); that the witness had never made a public complaint about Elkins playing any recordings to him or demanding \$10,000 prior to Crosby's hearing the tapes at Brad Williams' home (2382) and that the reason he didn't was that his superiors told him to ignore it (2382-2383); and in answer to a question of the Court, the witness stated he was not able to identify what was referred to by Government's Exhibits 1 to 5, inclusive (2388).

JANICE LANGLEY, the wife of the District Attorney, was called and testified that she had seen the defendant Elkins three times at their house. The first time he came to their house when they were bed early

one morning (2392) in late summer 1955 and Mr. Langley answered the door on that occasion. She next saw Mr. Elkins in late October, 1955, and that she fixes that date because (2393) "our youngest child was not born at that time but was going to be" and that on the second time Elkins had some typewritten transcript of some recorded conversations that he brought to show Mr. Langley and that she saw them in her husband's hand in their living room (2393). That the occasion was either a Sunday or a holiday on Elkins' first visit (2394); that on the second visit Elkins was not there over a half an hour (2395) and that he was sitting in the living room; and that she next saw Mr. Elkins the following morning when she was there and the one child who wasn't in school was outside playing (2397); that she answered the door and the defendant Elkins came in, had some tapes on a machine which he plugged in and played; that she asked him to leave but Elkins said taht her husband had not heard these tapes, he didn't want to hear them yesterday, and he played them for me; that a little later on he said that for \$10,000 he'd leave those tapes for me, I could have them (2397); that she was getting ready to leave the house when she saw Elkins going out the front door; that the first conversation she heard was one between Mr. Langley and Mr. Maloney (2399), and the second was about Ron Moxness and that she recognized hearing her husband's end of that conversation (2399-2400); that her husband would have been willing to take some action but that "I am the one that put my foot down" (2401); that the occasion of Elkins' first visit was a disturbing

event (2405); that her husband told her Elkins had a gun with him (2404); that it was a Sunday or a holiday, that she could not place it more definitely than the late summer of 1955 (2403 to 2405); that she had previously testified that defendant Elkins' second visit was around the middle of October (2406); that on the occasion of the second visit of defendant she came in while her husband was reading the papers (2414) and she saw some papers in her husband's hand (2415); that she does not know how long the visit lasted (2416); that the witness and her husband discussed the second visit in detail (2419); that Tom Maloney has been a visitor at the Langley home and frequently been there for meals (2420).

That after the second visit he came at 10:00 o'clock the next morning for the third and last visit. That it was a school day (2421). She does not remember the weather. That on one visit he was wearing a gray suit but she is not sure of the other times(2425); that after Elkins walked in he plugged it in and voices started coming out (2428-2430); that her only conversation was she asked him to leave but she doesn't remember when (2430-2431); that Elkins said that for \$10,000 he would leave these tapes but those are not his exact words; that his car was parked in front (2432); that the tape recorder was placed on the love seat to play (2432); there was no changing of reels and she does not know whether Elkins put a reel on before he started to play (2434); that she recognized her husband's voice and Mr. Maloney's voice (2435); that she had heard both of the conversations she recognized

from her husband's end of the telephone; that she particularly remembered the Moxness conversation; that after hearing a little bit of the second conversation Mrs. Langley left the room; that she remembers the other conversation because it was someone trying to pick up money in his (her husband's) name (2437-2438); that on the first recording she heard was a telephone bell sound; that the sound she heard was a "ting-a-ling-a-ling" rather than a "buzz-buzz" sound (2439); that Elkins paid no attention the first time she asked him to leave (2442) and that she was going to leave when she saw that Elkins had left (2443); that she called her husband and asked him if he would come home for lunch which he did; that her husband did come home for lunch; that the witness never saw a gun on Mr. Elkins (2448) and noticed no bulges in either pocket (2449).

That she thinks Mr. Maloney originated the calls, that she did not have \$10,000 at home on that Monday morning (2454).

MALONEY recalled for further cross-examination:

That he was asked to come down from Spokane in 1954 to work on behalf of Langley and other men on the Democratic party running for office and that he was asked by Mr. Elkins (2472); that Exhibit 70 looked like his handwriting but he didn't recollect writing that kind of a letter. The return address was his return address and it appeared to be his handwriting but that Exhibits 71 A, B and C, he does not think is his signature and he doesn't remember writing that kind of a letter (2476). The witness then stated

positively he did not write the letter and he wanted to get a handwriting expert (2478) but that as far as Defendants' Exhibit 71-A, he did write PERSONAL but he would not agree that he wrote the letter because there is no date on the letter. That he went fishing with defendant Clark once (2482) in 1955 (in the St. Helen's drinking water reservoir).

End of testimony.

The Government rested (2455). Defendants moved for an acquittal (2458, 2459) and made a motion to elect (2459) and on Count II the Government elected conversation 3-1-3; on Count III the Government contended that since there was only one possible conversation identified, no election was necessary (2461); the number of the Count III conversation was 2-1-1; on Count IV there was only one conversation, 2-1-13 and therefore no election was necessary (2462). Count V the Government elected to rely on conversation 2-1-7. On Count VI, the Government elected 2-2-3; Count VII, the Government elects to rely on 2-1-3 (2464) and on Count VIII with 2-1-14.

On Count IX, the Government contended no election was necessary and the conversation was 5-2-1.

The Government stated that all divulgences were to Langley and Crosby except the one on Count VI to Mrs. Langley.

After argument, the Court withdrew overt Acts I and II from consideration by the jury and withdrew Counts III and IV. All other motions of the defendants were overruled.

The defendant then moved for a mistrial on the ground that the Government had introduced evidence of 18 to 21 conversations, then only some seven were elected. Defendant Clark joined and the Court overruled the motions.

The defendants then rested without putting on evidence and renewed their motions to acquit generally and specifically and they were overruled (2491). The Court commenced instructing at page 2492.

EXHIBIT INDEX—Motion to Suppress

DEFENDANTS' EXHIBITES:	(M.S. Pages) FOR IDEN. REC'V'D.
1—Photographic copy of Affidavit	40
2—Photostatic copy of document	95
3-8—Exhibits Attached to Motion	158
9—3-page document REPLY TO MOTION OF DEFENDANTS FOR DISMISSAL OF INDICTMENT	160
10—Copy of subpoena addressed to Ronald E. Sherk	332
10—Original copy of subpoena to produce documents addressed to Ronald E. Sherk	182 183
11 & 11-A—Photostats of two Entry Cards	273 273
12—Document ANSWER TO MOTION TO SUPPRESS AND RETURN OR DESTROY EVIDENCE	343 349
13—Document REPLY TO MOTION OF DEFENDANTS FOR DISMISSAL OF INDICTMENT	362 367
14—Photostatic copy of document STATE OF OREGON EXECUTIVE DEPARTMENT ORDER	436 438
15—Photostatic copy of 2-page document STATE OF OREGON EXECUTIVE DEP'T ORDER	436 438
16—4-page document MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO QUASH AND MOTIONS TO SUPPRESS	462

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COURT'S EXHIBITS:	(Tr. Pages)	FOR IDEN. REC'V'D.
1—Original indictment in the present case.	32	
2—Certified copy of indictment in the present case.	32	
3—A copy of the Oregonian dated Wednesday, April 17, 1957.....	94	
3-A—Page 14 of the Oregonian dated Wednesday, April 17, 1957.....	94	
19—A subpoena directed to Terry Schrunk.	796	
29—A document purporting to be a United States District Court subpoena issued to Mr. Oscar D. Howlett.	1143	1143
32—A document purporting to be a United States District Court subpoena issued to Claude Cross, Oregon State Police, Milwaukie, Oregon.	1197	1197
33—A newspaper article from the Portland, Oregon Journal, Tuesday, April 30, 1957.....	1210	
38—A document purporting to be a United States District Court subpoena addressed to, among others, William M. Langley, Multnomah County, District Attorney's office.	1391	1391
42—A postal card dated April 21, 1957	1521	
43—A postal card dated May 1, 1957.	1521	

EXHIBIT INDEX (Cont.)

GOVERNMENT'S EXHIBITS:	FOR IDEN.	REC'V'D.
1—A roll of electronic recording tape on a reel.....	101	194 1937
1-A—A small cardboard box, the con- tainer for Exhibit 1.....	102	194 1937
1-B—A small piece of note paper.....	103	826
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No. 15378

United States
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for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

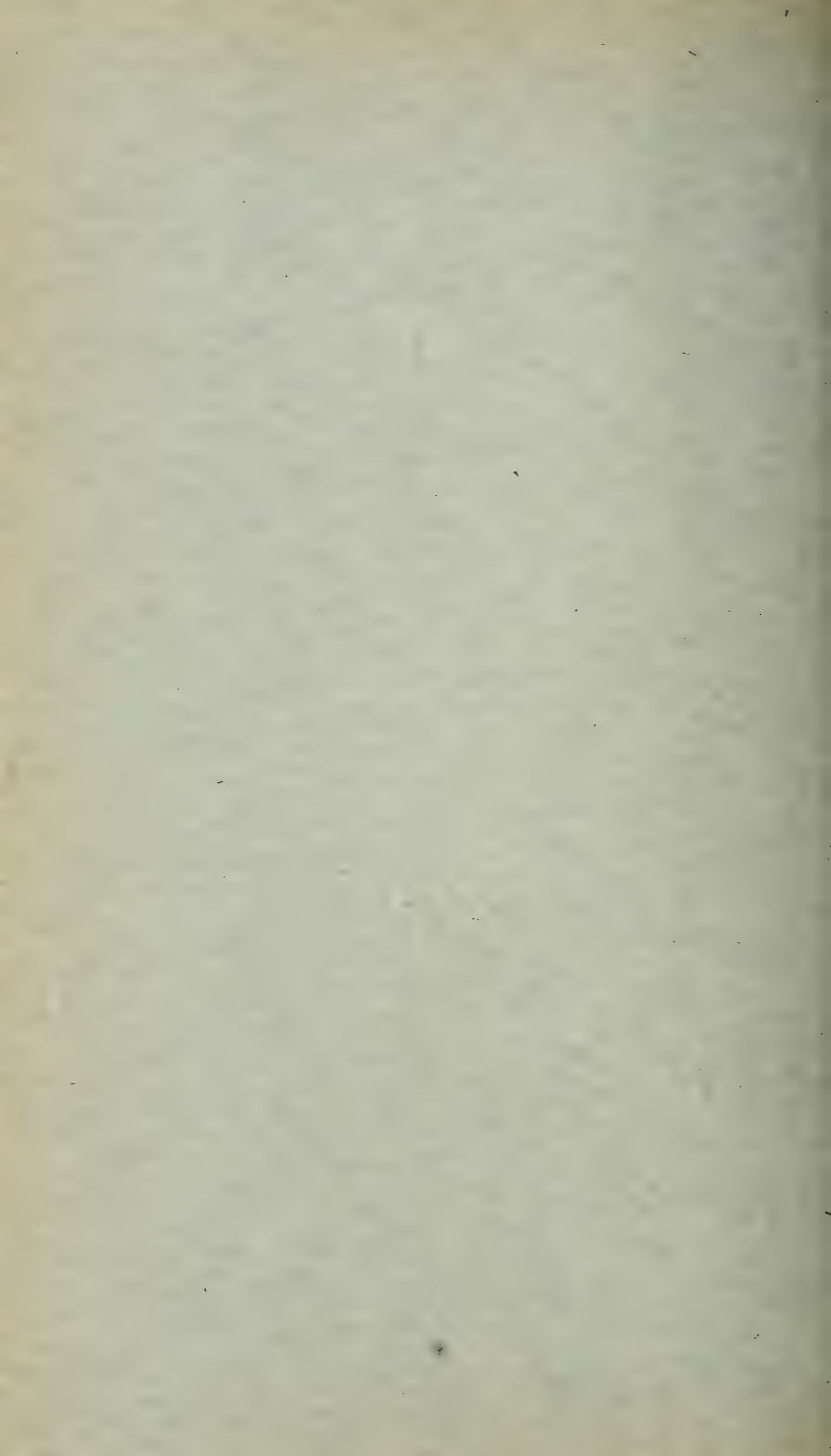
*Appeal from the Judgment of the United States
District Court for the District of Oregon.*

FILED

DEC 20 1958

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PAUL P. O'BRIEN, CLERK



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COMPILER'S NOTE

In references in this brief:

Testimony is cited as transcript or (Tr.).

Motions to dismiss and to suppress are cited as such or (M.S.).

Transcript of Record is cited as such or (Rec.).

No. 15378

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

*Appeal from the Judgment of the United States
District Court for the District of Oregon.*

OPINION BELOW

The judgment of the court below was rendered without opinion upon the jury's verdict.

JURISDICTION

Jurisdiction of the District Court is conferred by 18 USC § 3231. Jurisdiction for review by this court is conferred by 28 USC §§ 1291 and 1294(1) and Rule 37(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

By their appeal, appellants question the constitutionality of 47 USC § 605, the sufficiency of the indictment except as to the conspiracy count, Count I, the denial of a bill of particulars, the admissibility of evidence, the failure to suppress evidence, the sufficiency of the evidence, the denial of motions to dismiss, the instructions of the court, failure to use defendants' verdict forms, failure of the court to grant additional continuance and the court's use of language in instructions comparable to that used by government counsel in closing argument. Arising from these questions are two of primary interest and concern. They are (1) the availability to the government of evidence which may have been illegally seized by state officers without participation of federal officers, and (2) the power of the federal court to compel testimony from persons who have been enjoined by state court from giving testimony.

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES— ARTICLE VI, Clause 2—

“Supreme Law of Land—This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

18 USC 371—

*“Conspiracy to commit an offense or to defraud United States—*If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

“If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”

28 USC § 2283—

“Stay of State court proceedings—

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

47 USC § 501—

*General penalty—*Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than \$10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter

punishable under this section, shall be punished by a fine of not more than \$10,000 or by imprisonment for a term not exceeding two years, or both."

47 USC § 605—

*"Unauthorized publication or use of communications—*No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the

receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.”

**FEDERAL RULES OF CRIMINAL PROCEDURE—
Rule 26—**

“*Evidence*—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”

STATEMENT OF THE CASE

The defendants were each convicted by jury trial of conspiracy to violate the federal wire tap statutes, and of six counts of substantive violation of the wire tap statutes.

The indictment charged and the evidence was that Elkins was Clark’s employer during the period of the alleged violations (Rec. 11, Tr. 2127).

There was evidence that one Maloney was a tenant in Apt. 502, King Tower Apartments in Portland, Oregon during August, September and October 1955 and was there served by a telephone connected with an interstate telephone system (Tr. 2021); that said apartment had previously been rented by Bernard Kane (Tr. 1944-45); that Bernard Kane had rented Apt. 502

on behalf of Elkins (Tr. 2000); that Kane, at Elkins' request, in early August 1955, obtained occupancy of Apt. 503, which adjoined 502 by common wall (Tr. 2002-3). A hole was found in the common wall about the size of a pencil (Tr. 1947-48), and in another nearby wall inside Apt. 502 behind some removable kitchen cabinets, a hole had been scooped, with pin-size holes punched in the wallpaper on the livingroom wall at the location of this hole (Tr. 1947-49).

On May 17, 1956 the District Attorney of Multnomah County, Oregon executed an affidavit for a search warrant on information and belief that evidence of obscene pictures, sound recordings, etc. were on the premises where defendant Clark resided in Portland, Oregon. The night of May 17, 1956 state sheriff's officers executed the search warrant and seized from Clark's premises, among other things, five tape recordings (Tr. 578) (Received in ev. 1937) which contained recorded telephone conversations, some of which later became a basis of this proceeding. The tape recordings were on reels in boxes and in each box was a slip of paper with handwritten notations which were in the handwriting of defendant Clark (Tr. 1039). At the time of the search, evidence was that Clark, in response to the question, "Did you make these tapes for Elkins?" said, "Yes, I did and you know it and that's why you are here." (Tr. 582).

Also, Clark and Elkins, in the presence of a Mrs. Erickson (Tr. 2128) admitted recording conversations in Apt. 502, King Tower Apartments, by Clark, as Elkins' employee. On May 22, 1956, FBI agents were

invited to audit the tapes (Tr. 225), heard a portion thereof and the tapes were removed to the State Grand Jury, which on May 22, 1956 returned an indictment against these defendants (appellants herein) for violation of the Oregon wire tap statute.

The magistrate who had issued the search warrant ruled the search and seizure illegal on May 23, 1956, ordered certain contraband slot machines taken during the search destroyed and directed that the tapes in question be turned over to the sheriff for release upon the "direction of the Attorney General of the State of Oregon or such higher circuit or supreme court before whom the matter may be heard" (Rec. 65). On May 29, 1956, the sheriff delivered the tapes, etc. to the Attorney General of Oregon and the state police. The state police placed the articles in a bank deposit box from which they were obtained September 5, 1957 by the government by federal search warrant.

Federal indictment was returned February 4, 1957. The defendants were arraigned February 18, 1957 and a trial date of March 26, 1957 fixed.

The court granted a continuance on March 20, 1957 until April 16, 1957. Motions for bill of particulars, to dismiss and to suppress evidence and for further continuance were filed. After proceedings and testimony, these motions were overruled.

Early in the course of the trial, defendants brought proceedings in the state court to enjoin witnesses from testifying, many of whom had been called by defendants for testimony on the motion to suppress herein. Upon its

appearing that the federal court intended to compel testimony of such witnesses, defendants sought to arrest the trial by seeking a stay to allow petition for a writ of prohibition from the Court of Appeals, Ninth Circuit, Case No. Undocketed, decided April 22, 1957 as "*In re Petition of James Butler Elkins and Raymond Frederick Clark, Petitioners, for a stay to enable the filing of a Petition for Writ of Prohibition.*" After denial of the Petition the trial proceeded. Those having possession and custody of the tapes, notes, etc. from the time of their discovery at Clark's residence until the trial, testified as to the identity and lack of alteration. The tapes were played audibly and witnesses were called who identified their own telephone conversations thereon and testified that they were unaware of the interception and recording thereof, that such was unauthorized, as was any divulgence or use thereof by the defendants. Three witnesses testified to divulgence or unauthorized use of various of the recorded conversations by the defendant Elkins. The defense rested at the close of the government's case.

The sentences were:

Elkins: Count I 10 months imprisonment and fine
 of \$1,000.

Count II Same as Count I, consecutive there-
 with.

Count V)	6 months concurrently with each other and concurrent with period imposed for Counts I and II.
Count VI)	
Count VII)	
Count VIII)	
Count IX)	

Total—20 months and \$2,000.

Clark: Count I 4 months imprisonment and \$250 fine.

Count II 60 days imprisonment consecutive with Count I and \$250 fine.

Count V)	
Count VI)	60 days concurrent with each
Count VII)	other and with imprison-
Count VIII)	ment imposed for Count II.
Count IX)	

Total—4 months and 60 days and \$500 and costs.

Counts III and IV were withdrawn by the court.

Violation of 18 USC § 371, involving conspiracy to commit a misdemeanor, is punishable by a maximum of the penalty prescribed for the misdemeanor.

The conspiracy charged is violation of 47 USC §§ 501 and 605, punishable by a maximum of one year and/or \$10,000 fine for first offense.

ARGUMENT

Appellants' opening brief is such a broadside attack on the entire proceedings that for clear discussion of the proceedings, appellee submits that initially the affirmative sufficiency thereof should be discussed, followed by particular treatment of appellants' points not covered in such discussion.

Appellee proposes to demonstrate:

I. 47 USC §§ 501 and 605 are constitutional.

II. The indictment was sufficient:

A. As to Appellant Elkins.

- (1) Only Counts I and II need be sustained to support the sentence.

B. As to Appellant Clark's Special Objections.

- (1) Only Counts I and II need be sustained to support the sentence.

III. The Court properly denied motions:

A. For suppression of evidence:

- (1) The state search, even if illegal, was without participation by federal officers.
- (2) *Rea v. U.S.* did not support the state court's injunction against witnesses herein.
- (3) Appellant Elkins had no standing to object to the state search of Clark's premises.
- (4) Appellants have no standing to object to the acquisition of the questioned evidence by the federal agents.
- (5) Use of evidence does not depend on legality of federal search.
- (6) Federal search was regular and valid.

B. for discovery;

C. for dismissal;

D. for bill of particulars;

E. for additional continuance;

F. for judgment of acquittal;

G. for new trial;

H. in arrest of judgment.

IV. The Court properly compelled testimony under state court restraining order.

V. The evidence was sufficient to support the verdict.

VI. The Court's instructions were not erroneous.

VII. The sentences were lawful and should be affirmed.

and conclude with the further topics:

VIII. Summary of discussion as related to appellants' Specifications of Error and treatment thereof not elsewhere discussed in Appellee's Brief.

IX. Comment on Appendix to Appellants' Brief.

On the Motion to Suppress.

On the Merits.

X. Appellants' paradoxical Position.

I. 47 USC §§ 501 AND 605 ARE CONSTITUTIONAL.

Appellants, in their Specification of Error No. 1(f), attack the constitutionality of §§ 501 and 605, Title 47, United States Code, arguing that § 605, which describes the proscribed conduct, is so vague as to not constitutionally charge an offense and because it may be interpreted to apply to intrastate telephone communications allegedly outside the power of Congress to regulate.

Appellee submits that while the statute covers broad fields of communications and ideally could have been more artistically drawn, there can be no doubt in a fair reading thereof that intercepting telephone messages and divulging the contents thereof, or the divulgence or use of messages known to have been so intercepted, violate the statute.

Constitutionality of the statute requires no more, even though strained semantics and tortured construction may demonstrate that certain conduct which might appear to come within the literal terms would so dilute the statute that to sustain it requires interpretation. The courts can make such interpretation without condemning the act. *Rathbun v. U.S.*, 355 U.S. 107(1957).

Interstate communications need not be involved. The evidence in this case is, however, that the lines to Maloney's apartment in King Tower Apartments were connected to interstate lines. *Weiss v. U.S.*, 308 U.S. 321 (1939); *U.S. v. Varlack*, 2 Cir. 1955, 225 F.2d 665; *Benanti v. U.S.*, 355 U.S. 96 (1957), all apply the statute to intrastate communications. The *Benanti* case states: "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under Sec. 605, that portion of the statute pertinent to this case applies both to intrastate and interstate communications. *Weiss v. U.S.* * * *" The *Benanti* case held that § 605 preempted the field of protection of wire communications so fully that state constitutions could not lawfully provide for authorized wire taps. Such sweeping doctrine seems unlikely to be based upon a statute about the validity of which the court may have entertained any doubts.

The court in *Massicot v. U.S.*, 5 Cir. 1958, 254 F.2d 58 at 61, definitely held that the statute states a crime. See also, *U.S. v. Gris*, 2 Cir. 1957, 247 F.2d 860.

II. THE INDICTMENT WAS SUFFICIENT:

A. As to Appellant Elkins.

The conspiracy count, Count I, has not been challenged as to form.

Count II is challenged by Elkins by his assertions (Spec. of Error Nos. 1(b) and (e)) that the count fails to allege the date or dates upon which the divulgence or

use of the communication took place and that the count fails to allege a wilful or knowing divulgence or use by defendants.

Count II of the indictment charge reads:

“That JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, the defendants above-named, on or about August 23, 1955 in the District of Oregon, did knowingly, wilfully and unlawfully, without authority of the senders thereof, intercept and record or cause to be intercepted and recorded, wire communications between William M. Langley and Thomas E. Maloney, and divulge or cause to be divulged the existence of such intercepted communications to others, to-wit: William M. Langley, Clyde C. Crosby and others whose names are to this Grand Jury unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. (Sections 501 and 605, Title 47, USC.)”

It is submitted that a fair reading of the charge establishes as on or about August 23, 1955 as the time of the alleged interception and divulgence, and that the clauses in the indictment as to interception and divulgence are both dependent upon and relate to the preceding language specifying that on or about August 23, 1955, they did the things charged, i.e., intercepted and divulged the communications. It is submitted that the repetition of the words “wilfully” and “unlawfully” before the description of the divulgence would have added nothing to the appellants’ understanding of the offense. A reading of the statutes referred to required proof of wilful divulgence, the language fairly requires it, and the court by instructions required proof thereof.

No alibi was offered. An exact date of the divulgence need not be proven. Witnesses called in connection with divulgence placed such between late summer and October of 1955, the fall of 1955, or late October or early November 1955. The proven occasions of divulgence were proximate to the time charged, and before the return of the indictment, well within the period of limitations. See *Bold v. U.S.*, 9 Cir. 1920, 265 F. 581. Under such circumstances, the requirements of indictment and proof thereunder meet established standards of criminal practice and procedure.

As this court has said recently in *Stapleton v. U.S.*, 9 Cir. #15477, 10/22/58:

“The general rules for determining the sufficiency of an indictment are well settled. Indictments are now immune from the technical challenges permitted at common law. They will be held sufficient if as a practical matter they state the elements of the offense clearly enough to enable the defense to prepare for trial and to plead a judgment in bar of a future prosecution for the same offense. Prejudice to the defendant is a controlling consideration. See *Hagner v. United States*, 285 U.S. 427 (1932); *Hopper v. United States*, 9 Cir. 1944, 142 F.2d 181; *Elwert v. United States*, 9 Cir. 1956, 231 F.2d 928.

“Appellant suffered no prejudice in the preparation of his defense. Counsel for Stapleton, with commendable frankness, conceded that his preparation for trial had not been hindered by the omission of which he complains. Furthermore, the Government submitted evidence tending to prove lack of consent by the owners of the property, and the jury was instructed that such lack of consent was an essential element of the offense. The indictment is adequate to protect Stapleton from any further prosecution for the same offenses charged here. We conclude

that the alleged defect in the indictment did not prejudice Stapleton.

“However, Stapleton contends that, regardless of prejudice, an indictment which fails to allege all of the elements of the offense precisely and expressly cannot support a finding of guilty. This argument disregards the nature and function of the indictment under modern concepts of criminal procedure. An indictment is not required to set out all those elements of the offense which must be found by the jury before they may find the accused guilty. It is sufficient ‘that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.’ *Hagner v. United States*, supra, at Page 433. In other words, all the essential elements need not be stated directly if they are necessarily implied. *Hopper v. United States*, supra, at page 184. Nor need the indictment exclude all exceptional circumstances which might serve to take the alleged acts out of the criminal category. *Rose v. United States*, 9 Cir. 1945, 149 F.2d 755.”

The count was sufficient to enable the defendant Elkins to prepare his defense and to prevent subsequent trial for an identical offense. The court required the government to elect particular conversations and acts of divulgence (Tr. 2460-66). Trial proceedings may bar subsequent proceedings on same facts, and overcome objection that an indictment does not protect a defendant against double jeopardy. As the court said in *Norris v. U.S.*, 5 Cir. 1946, 152 F.2d 808, at page 811:

“The function of a bill of particulars is to cure omissions of details that might enable the defendant to prepare his defense, and to protect him against a second prosecution for the same offense. In *Tubbs v. United States*, 8 Cir., 105 F. 59, 61, the court said:

'Defendants in this class of cases commonly affect ignorance of what they are indicted for, and great apprehension lest they shall be indicted for a second time for the very same offense, and be unable to prove by the record a former conviction or acquittal. No case of the kind has ever occurred, or is ever likely to occur, but the affected apprehension of each defendant that it may occur in his case is perennial. The supreme court has put a quietus on the stock objections by repeatedly pointing out that the defendant may apply for a bill of particulars * * *, and that parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal.'

"See also *Rosen v. United States*, 161 U.S. 29, 16 S. Ct. 434, 480, 40 L.Ed. 606; *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709; *Wharton's Criminal Pleading & Practice*, Section 481; 2 *Bishop's Criminal Procedure*, Section 816."

Also see *Roberson v. U.S.*, 5 Cir. 1956, 237 F.2d 536, at page 537:

"In passing on the objection that the indictment was in such indefinite terms that the accused could not plead an acquittal or conviction in bar of another prosecution, it must be borne in mind that, upon a plea of former jeopardy, the identity of the offenses may be established by other parts of the record or even by parol evidence."

Objections are made by appellant Elkins to Counts V through IX on these same grounds, which appear to require no additional discussion.

Appellant Elkins, however, claims that Counts V, VI, VII and VIII each charge two crimes and are therefore defective (*Appellants' Spec. of Error 1 (d)*).

That a statute may properly state different means of committing an offense, and the indictment allege the commission of the crime by those different means conjunctively, is established law. See *Johnson v. U.S.*, 5 Cir. 1953, 207 F.2d 413, at 319, 320.

“ * * * cases hold generally that if a statute denounces several things as a crime, or creates only one offense but states more than one way in which it may be committed, an indictment may, in a single count, charge violation of the statute in any or all of the ways stated therein, provided that the various ways by which the offense may be committed are alleged conjunctively rather than disjunctively, or alternatively. This rule, however, is not applicable to the present case, although it would not have been fatal to the indictment if the elements had been alleged conjunctively.

“ * * * Appellant's primary argument is predicated upon the contention that his defense was embarrassed by the use of the disjunctive 'or' rather than the conjunctive 'and' which he claims necessitated his preparing three different defenses to the single count of the indictment. Obviously, he would have been in no different position if the conjunctive had been used, since proof of his knowledge that the jewelry had either been stolen, converted or taken by fraud at the time he transported it would sustain a conviction. There can be no valid contention that appellant's defense was embarrassed or that he was surprised by the evidence offered against him at the trial merely because the indictment alleged the prohibitive character of the goods in the disjunctive rather than in the conjunctive. The indictment did not charge appellant in the alternative with having committed one or another of several offenses. He was charged with only one offense.”

Appellant complains of a mixture of clauses of the

statute in the indictment. At most, the indictment alleges different means of committing an offense against a wire communication, as does the statute.

(1) Sustaining Counts I and II of the seven upon which he was convicted will support the sentence and judgment as to appellant Elkins. *Simpson v. U.S.*, 9 Cir. 1957, 241 F.2d 222, reversed on other grounds, 355 U.S. 7 (1957).

B. As to Appellant Clark's Special Objections.

Appellant Clark joins Elkins in challenging Counts II through IX concerning the assertions as to the alleged omissions of dates of divulgence and wilful and knowing divulgence or use. He also objects to Counts V, VI, VII and VIII as applied to him, alleging that the acts of divulgence or use described are not attributed to Clark. These counts were submitted to the jury on the theory that under the charge the jury could find that as to these counts, Clark aided and abetted Elkins and could therefore be found a principal.

It is well to note that these defendants are both charged in Count I of the same indictment with conspiracy and that each of the substantive counts are alleged as overt acts in furtherance of the conspiracy. The counts could not have been challenged on this ground had the pleading included Clark's name as having actually divulged (although proof would show Elkins the actor) or with having aided and abetted Elkins in the divulgence (by the interception and recording).

Reading the indictment as a whole, the count fairly apprises Clark that he is charged in concert with Elkins in the scheme to intercept and divulge and with the accomplishment of the fruits of the scheme in a manner supportive of the substantive counts charging both defendants. That two persons do different acts in the accomplishment of a crime requiring both will not prevent their joint activity from being criminal as to each. *Russell v. U.S.*, 5 Cir. 1955, 222 F.2d 197.

(1) However, Clark raises these objections only as to Counts V, VI, VII and VIII. Clark's other objections are answered by discussion of Elkins' objections in the preceding sub-topic. Affirmance of Count I and Count II will support the judgment and sentence.

III. THE COURT PROPERLY DENIED DEFENDANTS' MOTIONS:

A. for suppression of evidence.

(1) *The state search, even if illegal, was without participation by federal officers.*

Appellants, in their Specification of Error Nos. 2,(3) and (4), contend that any illegality in the state search and seizure should prevent its use, contending that the state officers' search was predicated on no desire to enforce state law, but had as its sole object federal prosecution, and that common practice of federal-state police agency official cooperation made the state search binding on the federal officials and the evidence inadmissible.

The refutation of the first assertion is the return of a state indictment for violation of the Oregon wire

tap law on May 22, 1956, five days following the execution of the search warrant, and the uncontroverted testimony. Counsel suggests that the *Benanti* case, *supra*, decided more than two years after the search and holding that state provisions conditionally authorizing wire tapping are counter to 47 USC § 605 and therefore in conflict with a supreme federal law and invalid legislation, should require the finding that the state officers intended no state prosecution in connection with the search. Such reasoning is highly specious. Cf. *People v. Grant*, N.Y. Ct.Gen.Sess., NY Cty 11/7/58, 27 L.W. 2243, 11/25/58. It is further to be recalled that the search warrant was concerned with obscene photos and records—not evidence of wire tap violation, state or federal. The record contains no support for appellants' position.

Appellants attempt to torture acts of ordinary courtesy after all evidence has been gathered up by state officials into such "federal cooperation" as will taint the evidence with illegality in federal court.

The evidence is clear and uncontroverted in this case that the federal officials had no prior knowledge of the intended search, did not participate in, nor join it. General harmony among police agencies in furtherance of the constant effort to suppress crime must exist for the good of all. *Andersen v. U.S.*, 9 Cir. 1956, 237 F.2d 118. That it does is all that the testimony herein showed. Such cooperation is not the tainting circumstance of *Gambino v. U.S.*, 275 U.S. 310 (1927), in which case the search was by New York officers for prohibition

violations, New York having no prohibition law, or *Byars v. U.S.*, 273 U.S. 28 (1927), in which the federal alcohol tax agent actually accompanied the state officers in the execution of their search warrant and physically participated in the search.

Appellants, by pursuing forcefully this contention, detract from their further argument that if the state search was illegal, it is thereby inadmissible in a federal prosecution even without federal participation or common practice or state search with intended federal use only. *Hamer v. U.S.*, 9 Cir. 1958, 259 F.2d 274.

This circuit has recently reiterated the doctrine that federal prosecution may be based on evidence illegally obtained by state officers absent federal participation. *Rios v. U.S.*, 9 Cir. 1958, 256 F.2d 173; *Symons v. U.S.*, 9 Cir. 1949, 178 F.2d 615.

Appellants urge this court to repudiate its steady position on this question, citing the decision of *Hanna v. U.S.*, D.C. Cir. #14462, 10/2/58. The *Hanna* case reaches its conclusion by speculating on possible future action of the Supreme Court. It rests in part on a bit of footnote dictum in *Benanti v. U.S.*, *supra*, suggesting that the use of such evidence in federal courts has remained an open question in the Supreme Court.

Appellee must respectfully disagree that such question has remained an open one in the Supreme Court. Such a statement ignores too much of what the Supreme Court has said before. The overwhelming weight of the various circuits' decisions requires admission of such evidence.

Historically, the United States Supreme Court held in *Weeks v. U.S.*, 232 U.S. 383 (1914), that evidence obtained by an illegal search and seizure by federal officers was subject to suppression and inadmissible in a federal court. However, in that same case, the court held that evidence obtained by state officers not acting under federal authority was admissible in a federal trial and that the 4th Amendment did not require exclusion on the basis of the state action and did not apply to state action. In *Byars v. U.S.*, *supra*, the court did not question the right of federal authorities to use evidence improperly seized by state officers operating independently and said nothing in regard to the application of the 4th Amendment as applied to state action. Against this background, the Supreme Court decided *Wolf v. Colorado*, 338 U.S. 25 (1949), which is principally relied upon by the court in the *Hanna* case, *supra*. *Wolf v. Colorado*, *supra*, and *Irvine v. California*, 347 U.S. 128 (1954), hold that the 4th Amendment is applicable to state action through the due process clause of the 14th Amendment, but that the 4th Amendment does not thereby require state courts to adopt the federal rules of exclusion, but that the states may provide other remedies for invasion of constitutional rights. In *Hanna*, the court reasoned that the *Wolf* decision holding that the 4th Amendment is applicable to action by state officers, changed the basis upon which the *Weeks* case held that evidence illegally obtained by state officers was admissible in federal courts. It is submitted that this conclusion is erroneous in the light of *Lustig v. U.S.*, 338 U.S. 74 (1949). The *Lustig* case was decided

on the same day that the *Wolf* decision was announced. The opinion of Justice Frankfurter went to great lengths in pointing out that in his view there was federal participation in the search, thus rendering inadmissible the evidence so obtained. However, relying on the *Byars* case as his authority, he at page 79 carefully preserved the "silver platter doctrine." It would not have been necessary to do this or to establish federal participation if the Justice believed, and those joining with him believed, that evidence obtained illegally by state officers was inadmissible in federal trials under the *Wolf* decision. If the evidence be inadmissible merely because of an illegal search by state officers, there is no need to examine further the question of federal participation. The footnote mentioned in the *Benanti* case, *supra*, seems to disregard the "silver platter doctrine" expressed in *Byars v. U.S.* and *Lustig v. U.S.*, *supra*.

The *Hanna* case apparently overlooks the fact that in the *Wolf* case the Supreme Court paid great respect to Justice Cardozo's opinion in *People v. Defore*, 150 NE 585, N.Y. (1926). In his often-cited opinion, Justice Cardozo rejected suppression on policy grounds in the face of a state statute forbidding unreasonable searches and seizures. Thus, contemporaneous application by the Supreme Court of the *Weeks* case, did not lose sight of the fact, as exemplified in the Appendix to the *Wolf* opinion, that unreasonable searches and seizures were sanctioned in some form at least in the states insofar as evidence was concerned at the time of *Weeks*. The Supreme Court was aware in the *Wolf* case of the seriousness of "overriding relevant rules of evidence."

It did not overlook Justice Cardoza's concern with the "social need that crime should be suppressed." Recently, the Supreme Court of the United States denied certiorari in the case of *Gaitan v. U.S.*, 356 U.S. 937 (1958). The *Gaitan* case sought certiorari of a decision of the 10th Circuit permitting evidence of marihuana illegally seized by state officers in a federal trial, 10 Cir. 1958, 252 F.2d 256. Since the *Lustig* case, as before, the "silver platter doctrine" has been accepted as controlling in numerous decisions of the Courts of Appeals. *Losieau v. U.S.*, 8 Cir. 1949, 177 F.2d 919 at 923; *Parker v. U.S.*, 9 Cir. 1950, 183 F.2d 268 at 270; *Fredericks v. U.S.*, 5 Cir. 1953, 208 F.2d 712 at 714, cert. den. 347 U.S. 1019 (1954); *U.S. v. Stirsmann*, 7 Cir. 1954, 212 F.2d 900 at 905; *Jones v. U.S.*, 8 Cir. 1954, 217 F.2d 381; *U. S. v. White*, 7 Cir. 1956, 228 F.2d 832 at 835; *Collins v. U.S.*, 6 Cir. 1956, 230 F.2d 424. See also, *Costello v. U.S.*, 8 Cir. 1958, 255 F.2d 389, cert. den. 10/13/58.

Sound reasoning supports the rule of the "silver platter doctrine." Federal courts are not concerned with disciplining or correcting state officers. The exclusion of such evidence in federal trials would not effectively curb state officers bent on procuring evidence of a state violation, which evidence, through the processes of law enforcement, may ultimately find use in a federal prosecution. Adoption of a rule requiring federal courts to consider the legality, under federal 4th Amendment standards, of a search by state officers, would put a pointless burden on the federal courts, which only adopted an exclusionary rule in 1914 by *Weeks v. U.S.*, *supra*. To require federal courts to be either bound by

state court findings of an illegal search or to apply state standards of admissibility would be opening the door to as many rules of suppression as there are states. It would invite unseemly and pointlessly conflicting rulings between state and federal courts on the same facts. It would allow the states to determine what evidence is admissible in the federal courts. This cannot be. It is for the federal court to decide what evidence is admissible at a federal trial. *Wolfe v. U.S.*, 291 U.S. 7 (1934); *Serio v. U.S.*, 5 Cir. 1953, 203 F.2d 576, cert. den. 346 U.S. 887 (1953). To allow state decisions and law to so apply would be disruptive of a uniform system of federal criminal law and procedure.

As is pointed out in 18 USCA, Federal Rules of Criminal Procedure, Rule 26, at page 255—"Notes of Advisory Committee on Rules":

"2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, rule 43(a), 28 U.S.C.A.), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship, the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in the Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another."

It may be suggested that federal courts might apply only federal standards to the search and disregard who made the search. Jealous regard for our constitutional liberties does not require such doctrine for the protection of our liberties. Federal prosecutions should not be frustrated by the acts of those not part of or under control of the federal executive or courts. Wrongful action by others should not be a basis of virtual immunity from federal prosecution absent fault of federal officers.

The Constitution does not require exclusion of the evidence. The exclusionary rule is not a universal one in the states and has only been the law in the federal courts since 1914, and then only as a means of discouraging federal officers from unreasonable searches. (For summary, see Appendix to *Lustig v. U.S.*, *supra*). As was pointed out in *Wolf v. Colorado*, *supra*, other sanctions are within the powers of the states.

Because it is not the function of the federal courts to discipline state officers, a disregard of who made the search and application of the court's notions of reasonableness subjectively from the standpoint of the party offended by the search, does violence to the reason of the *Weeks* rule. Extension of such doctrine would even deprive the government of the benefits of evidence procured by overzealous acts of private persons or evidence gathered by police of another nation and delivered to government authority. The Constitution is not designed to conceal or suppress evidence of crime nor to aid the criminal. Protection of safeguards for the

innocent unavoidably often works to the advantage of the criminal. The rule of suppression recognized the practical limitations of sanctions available against federal officers who invaded private rights by search and seizure and sought to discourage them by making the fruits of such activity unavailable. The doctrine should not be extended.

Application of federal standards to a state search may require on occasion the determination of state law of arrest to which a search was incident, but in the case of a search warrant drawn under and conforming to state law but not satisfying federal law, application of such standards as a rule of evidence might subject the search to a standard different from that under which it was issued.

(2) *Rea v. U.S. did not support the state court's injunction against witnesses herein.*

It is suggested that because the state court here enjoined witnesses from testifying, as did the federal court in *Rea v. U.S.*, 350 U.S. 214 (1956), such testimony should not have been compelled. *Rios v. U.S.*, *supra*, by footnote dictum, reserves this situation as an open question.

If the state court should not be entitled to determine what evidence is admissible in a federal trial (see Point III-A(1) herein), the method by which the state court seeks to accomplish such improper purpose should be immaterial. The drastic doctrine of the *Rea* case was limited, appellee submits, to its particular facts in which the federal agent sought to "flout [the standards for

searches and seizures] and use the fruits of his unlawful act either in federal or state proceedings.” (page 218). The ruling had the effect, however, of telling a state what evidence it could use, at least under these circumstances, in a state prosecution. The fact that such action could be taken should be limited to the facts of that case, but in itself attests to the supremacy of the federal law on those unhappy occasions when federal and state laws collide. See *Benanti v. U.S.*, *supra*; *Cooper v. Aaron*, No. 1, Aug. Spec. term, 1958, US Sup. Ct. Op. 9/29/58, at page 15.

Because the Supreme Court saw fit to declare that federal officers might be enjoined from testifying in state courts does not enable state courts to do likewise to the frustration of the federal courts. The federal courts are empowered by statute, 28 USC § 2283, the supreme law of the land binding on state courts, to effectuate their jurisdiction, by injunction, if necessary. State conflict with this principle cannot be, although the courts, both state and federal, should be and usually are hard-bound by restraint and comity under a dual system to prevent unseemly conflict.

As the court said in *Riggs v. Johnson County*, 73 U.S. 166 (1867) at 195:

“The Constitution itself becomes a mockery, say the court, in that case [U.S. v. Peters, 5 Cranch 136] if the State legislatures may at will annul the judgments of the Federal courts, and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals [citing cases].

“State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and State courts act separably and independently of each other and in their respective spheres of action the process issued by the one is as far beyond the reach of the other, as if the line of division between them ‘was traced by landmarks and monuments visible to the eye’.

“Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit courts are wholly independent of State tribunals.”

Rule 26, Federal Rules of Criminal Procedure, would likewise seem to preclude the application of the *Rea* doctrine in reverse.

Should the court conclude that the *Rea* case is basis for a state court to, under like circumstances as to state officers, enjoin state officers from appearing to give testimony in federal court, it is submitted that the facts in the *Rea* case are definitely distinguishable from the instant case.

In the *Rea* case, the federal officer had conducted a search and seizure found illegal by the federal court in a federal prosecution. The officer thereupon carried the same evidence to the state and was the complainant to initiate the state court proceedings.

The Supreme Court extended the rule of *McNabb v. U.S.*, 318 U.S. 332 (1943) to supervise and restrict the

conduct of the federal officer characterized as flouting the federal requirements of search and seizure.

Herein, the state officers were not the moving parties to the federal action, which was initiated by grand jury indictment. The injunction herein was applicable not only to the officials who had signed the affidavit supporting the search warrant or executed the search, but to numerous others whose contact with the evidence was incidental after the search had been fully accomplished. Appellee has already discussed the problems facing a holding that would entitle state courts to take such action, even though, under *Rea*, federal courts under certain conditions may. See also, *Chicago, M. & St.P. Ry Co. v. Schendel*, 8 Cir. 1923, 292 F. 326, at page 329. The court reasoned:

“If witnesses, by order of a state court can be prevented from testifying in a federal court, then the federal court is a mere shell, to be crushed by the pressure of a state court injunction.”

(3) *Appellant Elkins had no standing to object to the state search of Clark's premises.*

As the court said in *U.S. v. Wexler et al*, S.D. N.Y. (1925), 4 F.2d 391, at page 392:

“Assuming the view most favorable to the petitioner from the record, the principles to be applied to the case are, in substance, these: (a) A defendant, whose person, house, or papers and effects have been the subject of unreasonable searches and seizures, in violation of the protection of the Fourth Amendment of the Constitution, will be heard to complain. (b) If the house or premises of a codefendant or co-conspirator are unreasonably searched without a proper search warrant, or pursuant to a

defective one, and property seized, he alone whose house has been so unreasonably and illegally searched will be heard to complain thereof. The evidence, if any, so obtained is, however, admissible against all other defendants.

“In the case of *Lusco v. U.S. (C.C.A.) 287 F. 69*, the indictment charged Lusco, together with one Ganci, with unlawfully selling narcotics. The narcotics in question were seized in Ganci’s apartment without a search warrant. Both defendants were convicted. It was held that the illegal search and seizure of the property in Ganci’s residence was in violation of his rights, but as to his co-defendant Lusco, even if the question had been seasonably raised, ‘it would be of no service to defendant [Lusco]. The protection of the fourth amendment safeguarded Ganci, but the illegal search and seizure as against Ganci cannot be availed of by Lusco.’ See, also, *Remus v. U.S. (C.C.A.) 291 F. 501*. Other cases might be cited to sustain the principle set forth, but it cannot be doubted that these cases set forth the law.”

Elkins only indirectly asserted ownership of the evidence involved through his counsel’s affidavit on the motion to suppress in federal court.

In the state court proceeding on the state wire tap indictment, subsequent to the evidence’s being acquired by the federal search warrant, the state circuit court ruled that the state search was illegal but did not suppress the evidence and purported to turn that which the court did not have and did not seek to obtain, over to the Attorney General of Oregon (Rec. 68).

The search at Clark’s premises did not offend the rights of Elkins. He could not and cannot complain thereof, even should Clark be entitled to in the proper forum.

At the jury trial of the within cause, neither appellant claimed the property and a very substantial portion of defendants' examination of government witnesses was calculated to cause the court and jury to conclude that the tape recordings offered were not the same or not in the same condition as those taken from the Clark premises. At the time of the initial offer of the tapes as evidence of *corpus delicti*, appellants did allude to the fact that the evidence had been suppressed by the state court (Tr. 167), but by the exhaustive questioning of identity during the trial and upon offer as evidence, took a position completely inconsistent with that on their motion to suppress (Tr. 1902-1936).

The appellants seem to be urging at trial that these are not the tapes taken, but some illegally were which should require the suppression of these.

The jury found the consistent position of the government basis for its verdict.

See *Haywood v. U.S.*, 7 Cir. 1920, 268 F. 795, at 802 et seq.

(4) *Appellants have no standing to object to the acquisition of the questioned evidence by the federal agents.*

No premises of either of the defendants were intruded upon by the federal taking, which was from a bank. The evidence had been placed in the bank by the state police officers, who had in turn received it from the State Attorney General, who had in turn received it from the sheriff, with whom it had been placed by the

magistrate after his ruling that the state search was illegal and the evidence suppressed.

The state magistrate suppressed the evidence, but instead of returning it to the owners, caused it to be at large insofar as these appellants are concerned. No problem of *custodia legis* is presented by the state court's action because the state, by suppressing the evidence, had spent state use thereof. *Custodia legis*, in its application as between state and federal courts, is a rule of comity and is not applicable under the theory of the appellants, because the rule of *custodia legis* depends upon a valid seizure or custody of the res. *Fountain v. 624 Pieces of Timber*, S.D. Ala (1904), 140 F. 381; *The Bessie Mac*, W.D. Wash. N.D. (1937), 21 F. Supp. 220, at 223. The state, having ruled its process invalid, had no further claim for retention of the property.

The requirement that a state first having jurisdiction over a *res* may exhaust its use thereof is discussed in *Taylor v. Taintor*, 83 U.S. (16 Wall) 366 (1872), in which the court said, at 370:

"Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, *until its duty is fully performed and the jurisdiction invoked is exhausted*: and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is unless there is some provision to the contrary—exclusive in effect *until it has wrought its function*." (Emphasis supplied)

and by *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865), in which the language of the court is, at 342:

“It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions.”

Herein, when the state magistrate had ruled the search and seizure invalid, he had exhausted the state's jurisdiction. A contrary rule would permit a court of one system to make permanently unavailable to the other the subject matter of a controversy appropriately in the jurisdiction of the other by the simple act of a continuing claim after its judicial use therefor had ended. Such is not the comity appropriate to a dual system striving to avoid unseemly conflict. The taking of the evidence by the federal agents on process of the United States Commissioner did not, under the circumstances, work any interference with any lawful state court custody.

The taking of the evidence from the bank, whether by consent of the bank officials, the state officers holding the keys to the deposit box or by federal search warrant, did not entitle appellants to complain, or to suppression

thereof. The search and seizure of the bank was not unreasonable as to appellants. Appellants had not pressed for return of the property from the state court or officers after suppression between May and September. As the Supreme Court stated in *Goldstein v. U.S.*, 316 U.S. 114 (1942), at 121:

“ * * * the federal courts * * * with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.”

The court, in Note 12 of the opinion, adds:

“The principle has been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits, and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts.”

See also, *U.S. v. Nagle*, N.D. N.Y. (1929), 34 F.2d 952, at 958. As Judge Learned Hand said in *Connolly v. Medalie*, 2 Cir. 1932, 58 F.2d 629:

“Men may wince at admitting that they were the owners, or in possession of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.”

See also, *Nielson v. U.S.*, 9 Cir. 1928, 24 F.2d 802.

(5) *Use of evidence does not depend on legality of federal search.*

Because the federal search of the bank and seizure invaded no right of the appellants on the record herein,

the use thereof in their prosecution does not depend upon the legality of the search. *Goldstein v. U.S.*; *Connolly v. Medalie*; *Nielson v. U.S.*; *supra*.

Certainly the appellants would have no more cause to complain against the use of the evidence because it was obtained by federal process, even if defective, from the possession of officials who could have without prejudice to the rights of the appellants delivered the evidence to the United States "on a silver platter."

(6) *The federal search was regular and valid.*

The search warrant was valid upon its face. The determination by the Commissioner in issuing a warrant to search premises for evidence of crime that probable cause for the search was established is conclusive unless the Commissioner's exercise of judgment was arbitrary or erroneous. *Dixon v. U.S.*, 5 Cir. 1954, 211 F.2d 547.

The law does not require as a showing of probable cause for issuance of a search warrant, that there be legal evidence sufficient for conviction. *U.S. v. Bell*, D.C. D.C. (1955), 126 F.Supp. 612; 17 F.R.D. 13; *Brinegar v. U.S.*, 338 U.S. 160 (1949), Note at 174, 175; *U.S. v. Klapholz*, S.D. N.Y. (1955), 17 F.R.D. 18; *Giacona v. U.S.* 5 Cir. 1958, 257 F.2d 450.

The finding of probable cause by the Commissioner was not arbitrary or erroneous. The affidavit of Mr. Sherk, the FBI agent, stated that as a fact *he had heard recordings* of telephone conversations intercepted and designed or intended for the use or benefit of a person or persons not entitled thereto, in violation of 47 USC

§ 605. He positively stated the location thereof and described the premises to be searched and the properties sought.

Appellants complain (Spec. of Error No. 2—1) that the search warrant was illegal because evidence on the motion to suppress showed that on May 22, 1956, Mr. Sherk listened to only one of the five tapes. Such objection is not valid if what he heard was evidence of crime. Such "sampling" may be compared to the revenue agent who tastes but one of several like-appearing jugs and detects whisky. Appellants also assert that Mr. Sherk had no knowledge of the means of the interception. Knowledge of the manner of interception, at this stage of the proceedings, in fact at any, was immaterial.

It is also complained that the affiant had no knowledge that parties to the conversations had not consented thereto. This was not the basis of the affidavit and warrant, although Mr. Sherk explained to the court that some of the parties had publicly claimed unauthorized interception. The basis of the warrant was that the recordings were intended for the use and benefit of persons not entitled thereto. Sufficient public claims had been made by some of the later witnesses at the trial and the motion to suppress to entitle Mr. Sherk, acting as a reasonable, prudent officer, to have such information. Neither Mr. Sherk nor the Commissioner was living in a vacuum.

Considerable time ($3\frac{1}{2}$ months) elapsed between the hearing of the tapes and the affidavit. However, that

does not alter the sound basis for belief that the tapes were the same and in the same condition. The tapes were not subject to consumption, as was the liquor in *Dandrea v. U.S.*, 8 Cir. 1925, 7 F.2d 861; *U.S. v. Dziadus*, D.C. W.Va. (1923), 289 F. 837 and *U.S. v. Nichols*, D.C. Ark. (1950), 89 F.Supp. 953, cited by appellants. In those cases, traffic in or manufacture of illicit liquor in the past were the subject of a present affidavit, without corroboration, and the searches intended to result in a finding of continued illicit activity not of the past act but of new, repeated violations. In the instant case, the time elapsed would not, under the circumstances of the intervening custody of the tapes, known to the affiant, cause his affidavit, made about three weeks after he had last seen them (Tr. 185), unreasonable. Appellants complain that Mr. Sherk could not identify the tapes because he had not marked them until after seizure. Marking is only one method of identity. Similarity of appearance with the like slips of paper certainly gave the agent reasonable basis for belief, together with his investigative contact, to entitle his reasonable and true belief that these were the same tapes. *U.S. v. Daniels*, D.C. N.J. (1950), 10 F.R.D. 225.

B. for discovery.

The appellants moved, on March 19, 1957, for permission to inspect and copy the tape recordings and wire recordings obtained by the government by seizure or other process.

This was permitted by the court before taking of evidence before the jury was commenced, and as soon

as appellants expressed desire therefor. The government did not resist inspection (M.S. 532-33).

Appellants had copies of the tapes from before the taking of testimony before the jury during the several weeks of trial, from April 16 to May 11, 1957, and rested at the close of the government's case. They did not press for earlier inspection. In these matters the trial court has discretion. No error was involved, and no injury to the appellants resulted from the time and nature of inspection asked for by appellants, not resisted by the government, and permitted by the court.

C. for dismissal.

The two dismissal motions are based upon the asserted insufficiency of the indictment (heretofore fully discussed under Point II) and the constitutionality of 47 USC § 605 (heretofore discussed in Point I). The above discussions of these points are referred to and incorporated for treatment of these motions.

D. for bill of particulars.

Appellants' motion to dismiss contained an alternative request for a bill of particulars indicating "the dates of the alleged divulgence or alleged use, or both, upon which [the government] intends to rely at the time of trial," and indicating the "manner of the alleged 'use and benefit' upon which [the government] intends to rely at the time of the trial."

The court rendered a written opinion denying the motions to dismiss and for bill of particulars. The court properly ruled that:

"* * * a reading of the Counts II thru VIII * * * that the plaintiff alleges that the 'interception' or 'receiving' and 'use' or 'divulgence' are alleged in the conjunctive as occurring on or about a date specifically named in the count. Any question of an election by the government as to one of several dates as developed by the evidence is reserved until time of trial." (Rec. 74).

The court denied the request for a bill of particulars as to the manner of the alleged "use and benefit."

This portion of the request for bill of particulars would only seek the government's evidence and is not necessary for the preparation of defense or to prevent subsequent prosecution on the same facts and charge.

The indictment in the case of *U.S. v. Gris, supra* (Cr. # 150-241, S.D. N.Y.), charged conspiracy in Count I, and in Count II charged:

"From in or about April, 1953, through April, 1954, in the Southern District of New York, the defendant Charles V. Gris, being then and there a person not authorized by the senders, did unlawfully, wilfully and knowingly intercept and cause to be intercepted wire communications to and from one Sally Fain at the Oliver Cromwell Hotel, 12 West 72nd Street, New York, New York, and did divulge and publish and cause to be divulged and published the existence, contents, substance, purport, effect and meaning of such intercepted communications to Bernard Spindel, Richard Chambers Rutherford, Louis Randell, Sammy Fain, Mary Grasso, and to other persons to this Grand Jury unknown. (Title 47, Sections 501 and 605, Title 18, Section 2, United States Code)."

In the conspiracy count, times of playing the recordings were set out in overt acts as was done herein (Rec. 12, *et seq*).

The defendant, Gris, moved for a bill of particulars. It was denied, Judge Frederick van Pelt Bryant stating in his opinion, N.Y. (1956) 146 F. Supp. 293, at 296:

"As I have already mentioned, the indictment in this case is clear and specific. Its allegations are fully sufficient to inform the defendant of the crime charged, the times involved, the places where the alleged offenses were committed and the persons with whom the defendant conspired to commit them.

"The defendant's 18 separate requests for particulars all call for details of the alleged crime. It is plain from the minutia of detail requested that the purpose of this motion is to require the government to present its evidence in advance of trial. This will not be permitted.

"Each of the defendant's three motions is denied in all respects."

The indictment against appellants follows substantially the form of the *Gris* indictment. It is not appropriate that the government be limited in proof of a crime which may be committed by alternate means which may be alleged conjunctively. Proof of one means is sufficient.

The request for dates of the alleged divulgence or use ignores the plain description thereof in the overt acts listed in the conspiracy count to which a bill of particulars could have added nothing. (See overt acts 5, 6 and 7, Count I) (Rec. 13, 14).

E. for additional continuance.

The court did not abuse its discretion in denying further continuance.

The indictment was returned February 4, 1957. The appellants posted bail on February 6, 1957. They were arraigned on February 18, 1957 (Rec. 22), entered pleas of not guilty and were allowed until March 18, 1957 in which to move against the indictment.

On March 2, 1957, the court fixed a trial date of March 26, 1957.

On March 18, 1957, appellants sought a 90-day continuance, alleging that additional time was needed to prepare because appellant Elkins had retained new counsel on March 11, 1957 and because of widespread publicity concerning appellants. The trial was thereupon reset on March 20 to begin April 16, 1957. On April 13, 1957, Elkins, having again retained new counsel (although his previous counsel remained in the case for his codefendant with no conflict of interest) moved for further continuance. Clark also sought further continuance at the same time.

Elkins' shifting of counsel was of his own making. The court, having granted one continuance, did not abuse its discretion in granting further continuance. *Baker v. U.S.*, 9 Cir. #15762, 5/6/58.

Appellants contend that the case was highly complex and required more preparation time than was available to defendants. It is submitted that the role of the prosecution was not less laborious.

Actually, apart from questions surrounding the admissibility of evidence, primarily legal and not deserving of extended conference between lawyer and client and

basically disposed of by the ruling of the court previous to the last motion for continuance at the time of the motion to suppress, a simple, factual question was presented as to whether or not the recordings were of intercepted telephone communications without consent of the senders and the connection of the defendants with the interception and divulgence alleged.

Certainly, from February 18 until April 16 was adequate time to prepare defense to such charges, even considering some other distractions involving defendants, themselves.

As to much shorter time for preparation, see *U.S. v. Yager*, 7 Cir. 1955, 220 F.2d 795, cert. den. 349 U.S. 963 (1955).

That the matter of continuance is within the sound discretion of the trial court is established. *U.S. v. Mathison*, 7 Cir. 1956, 239 F.2d 358.

The publicity herein was not such as would necessarily be adverse to appellants. The Senate hearings and publicity therefrom tended to place them in generally favorable light. There was no situation presented as that in which the defendant and his office were pilloried by the legislative arm as in *Delaney v. U.S.*, 1 Cir. 1952, 199 F.2d 107, relied on by appellants.

The court carefully examined the jury on *voir dire*, allowed further *voir dire* examination directly by counsel, the appellants did not exhaust their preemptory challenges and the court did not refuse to excuse any juror challenged for cause. *Hamer v. U.S.*, *supra*; *Graham v. U.S.*, 6 Cir. 1958, 257 F.2d 724 at 729.

During the trial, the jury was sealed and isolated from news affecting the trial or appellants.

U.S. v. Lebron, 2 Cir. 1955, 222 F.2d 531, cert. den. 350 U.S. 876 (1955); *U.S. v. Hoffa*, S.D. N.Y. (1957), 156 F. Supp. 495.

F. for judgment of acquittal.

Appellants sought acquittal at the close of the government's case and after verdict, challenging the evidence produced of "interception" and the definition of "interception" by the court, and the receipt of the recordings which were offered as evidence of "interception".

The court properly overruled the motions for acquittal.

The tapes were connected with defendant Clark by tracing them to his possession at his premises, and notes in the containers in his handwriting. The witness Kane established that Elkins had one time occupied Apt. 502, occasionally rented under Kane's name but paid for by Elkins, and that Kane, during the period which the testimony showed Maloney occupied 502, rented 503 for Elkins in Kane's name, but did not use it himself. The witness Carter found a hole in the wall leading between the two apartments and another hole and punched wallpaper in 502. The witness Erickson related statements which she took from Elkins and Clark as a stenographer or scrivener under a circumstance that communications by Elkins and Clark heard by her were not confidential communications or otherwise subject to exclusion as evidence under Federal Rules of Criminal Procedure 26, and the statements connected the appel-

lants with recordings related to Apt. 502 (Tr. 2059) and King Tower Apartments (Tr. 2067), the relationship between Elkins and Clark (Tr. 2084-91). The jury received such evidence, which tended also to link the appellants with recordings of telephone conversations, albeit stating circumstances intended to be exculpatory (Tr. 2127 et seq). The recordings themselves were as clearly "speaking exhibits" in that they spoke for themselves as evidence of the "interception". The jury was entitled as reasonable men and women to rely on common knowledge and experience in evaluating the sounds thereon, which included room noises abruptly ended and clear voices of both speakers to an obvious telephone conversation, the sounds of telephone buzzes, operators working calls, etc. The exact means of interception was not shown. It is submitted that proof of such detail was not required.

The court's instruction concerning interception was a fair definition thereof, and it is respectfully submitted that explicit instruction as to what constitutes interception should not be required under the concept that it is a word of common meaning and common understanding and used in the statute to denote proscribed activity which constituted an invasion of the means of communication which the statute sought to protect.

Appellee submits that the statute proscribes the surreptitious acquisition of messages from telephone lines (interception) and divulgence thereof, or divulgence or use of known intercepted messages.

As is pointed out in Footnote 5 to *U.S. v. Hill*, S.D. N.Y. (1957), 149 F. Supp. 83, at 85:

“When one considers that the electrical impulse of a telephone message travels at the speed of light or 186,000 miles per second, the fallacy of the time factor as the determinant becomes apparent. In any event nothing in § 605 or its history indicates that Congress intended the time factor as a test in determining whether an interception occurred.”

The decision seems in conflict with the later decision of the Supreme Court in *Rathbun v. U.S.*, *supra*, only as to use of extensions with consent of one of the parties to the conversation. Herein, each party to the conversations testified as to the identity of the conversations and as to the total lack of knowledge of and consent to the interceptions or recordings.

The instructions of the court must be considered as a whole. A fair evaluation of the instructions could leave no other impression in the minds of jurors that “in order to constitute the interception of a communication by wire as the Government contends in the various counts of the indictment you must be satisfied beyond a reasonable doubt that the communication by wire was taken or seized by the way or before that communication by wire arrived at the destined place. In other words, the taking or seizure of a telephone conversation to constitute an interception under the statute and under the indictment must occur while the communication is being made upon the telephone system.”

The additional explanatory language of the court merely points out that one meaning of “interception” is that the subject is prevented from reaching its intended destination and that that is not required here; that by

reason of the means of possible interception, such interception may occur "along the way" and not interfere with the progress of the message to its receivers.

Considering the court's language requiring interception before it reached its destination, while on the telephone system, the language of the court complained of by appellants on pages 108 and 109 of their Brief is properly limited. The language "during the progress of the conversation either through instrumentalities of electrical devices or through the human ear, it was heard by another party" must, considering the just-previous language, mean only "during the progress over the means of communication." Certainly, appellants could not seriously contend that listening without electrical or recording devices by means of a simple wire tap connection to the line between the conversants, for example, would not constitute interception. Such interception would be by human ear without electrical or recording devices.

Appellants, in seeking confusion, have confused the fair implication of the instruction as a whole.

Appellants attempt to discredit the tapes, themselves, as evidence of interception. Appellants invite the government to point out any evidence of interception and suggest that the tapes are equally consistent with the hypothesis that they were made by lawful means. The government welcomes examination and listening of the recordings by this court. They could only be consistent with recording by lawful means if the senders, or one of them, would know or be aware of the recording. Appel-

lants' argument ignores the contrary testimony of the parties to the conversations.

Appellants make much of the allegation that the recording device would be connected to lines intercepting the telephone lines of Maloney and suggest that the proof rests upon an inference upon an inference.

The hole in the wall is a circumstance from which reasonable jurors could find a line was used. The recordings require the use of a recording device. The recordings eloquently bespeak the fact of interception. The *unlawfulness* of the interception rests not upon inference but from the testimony of the parties to the conversations who had not consented thereto. A mechanical eavesdropping on a wire communication as it passes over the wire is, we submit, an evil Congress intended to proscribe. Auditing the evidence herein will show that the voices of both parties to the conversation were clearly recorded, often with room noise being excluded. Such would be extremely unlikely if what was being overheard and recorded was only the words of the speaker in a "bugged" room before they entered the telephone system on one end after leaving the telephone on the other end, as suggested by Appellants' Brief at page 107. Jurors are entitled to use reason. Numerous parties were involved in the recordings, concerning calls into or from the apartment of Maloney. On the state of the record, is the jury required to speculate, disregarding the suggestion of the note of *U.S. v. Hill, supra*, that the conversations were somehow miraculously recorded also at the other end of the conversations occurring, at the

office of the State District Attorney and his home, the office and home of the Assistant Liquor Administrator, the business of McLaughlin in Seattle, the home of Dorothea Anderson and elsewhere? Appellee submits not.

The indictment carefully avoided alleging that the lines connected to the recorder were physically attached to the telephone wires of Maloney, recognizing that by modern induction methods the messages on the wires in transit might well be intercepted absent direct connection therewith. Certainly Congress did not intend to make a new science of interception immune from the Act because no physical connection with the wires be necessary to accomplish the interference with the privacy of the means of communication sought to be protected. The fact of, not means of, interception was the proof required.

Appellants complain of the court's failure to give Elkins' requested Instructions 9 and 10. The court's instruction in different language covered the substance of these asked instructions. Considering the theory suggested by the footnote of *U.S. v. Hill, supra*, both the court's instructions and those submitted as Elkins' 9 and 10 required a finding more strictly in favor of the defendants than they were entitled to. Of this they cannot complain.

Appellee submits that appellant Clark's requested Instruction 9 is not germane to the evidence and issues nor present science applicable thereto and the instruction would have been misleading. The court properly did not give such instruction.

Appellants urge that the happenstance of the court's use of the analogy of a football pass interception was error because in closing argument appellee's counsel had used an illustration also related to a football pass. This is so even though the court's use of the football analogy was to demonstrate that an intercepted message need not fail to reach its intended receiver, yet be intercepted under the statute, and was in different terms for a different illustration than the use made by the appellee. Appellee's use of the illustration was to suggest the possibilities of the footnote to the *Hill* case, *supra*, and intended to suggest that the emphasis should be on the interference with the means of the communication during its intended transmission, not restricted to the fallacy pointed up by the *Hill* case. Such divergent uses of an analogy are certainly not basis for error. If appellee misstated the law, it is certain that the jury was well-advised by all counsel and the court that the instructions of the court should guide their deliberations. No objection to the argument was made by appellants. The small excerpted portion of the argument printed is not basis for challenging counsel's argument, of which no other criticism has been made.

G. for new trial.

Appellants appear to have abandoned the denial of a new trial as error, except as based on the claimed error of the instruction re "interception" heretofore fully discussed (Point III-G). In any event, it is submitted that there was no error in the record, or circumstance entitling the appellants to a new trial.

H. in arrest of judgment.

In support of their claim that the court erred in overruling appellants' motion in arrest of judgment, appellants limit their argument (Spec. of Error No. 14) to asserting that the court had no jurisdiction because the indictment in some counts did not allege interstate communications. It appears to be settled law that intrastate messages are also protected. (See cases cited Point I herein). The evidence of this case from the witness Swank clearly established that Maloney's telephone was connected to an interstate system. It is not necessary for the indictment to negative possibilities that the line might be a private intrastate logging company telephone as suggested by appellants. The indictment as a whole could only be read as involving a usual telephone of the system with which we are all familiar in daily use.

Appellants' Dyer Act analogy (Appellants' Br. 126) is inapt. The statute, 18 USC § 2312, expressly requires the interstate transportation of a motor vehicle knowing that it has been stolen, as a necessary element of the crime.

IV. THE COURT PROPERLY COMPELLED TESTIMONY UNDER THE STATE COURT RESTRAINING ORDER.

This topic is fully discussed under Point III-A(2) herein.

V. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

The government's evidence stood uncontradicted. It established that inter- and intrastate telephone conver-

sations to and from Maloney's apartment had been recorded, that Elkins had control of an adjoining apartment under incriminating circumstances, that Elkins and Clark had made statements (to the witness Erickson) connecting them with recordings of telephone conversations at the apartment in question; that the tapes were found at Clark's premises and Clark admitted to the witness Minielly, making the tapes for Elkins (Tr. 581-82). In the boxes of tapes were handwritten notes descriptive of parties to conversations in the handwriting of Clark. Maloney and other parties to the recorded conversations testified to identity of the telephone conversations and that they knew of no interception or recording and had not authorized use or divulgence by others thereof.

The recordings themselves spoke eloquently as evidence of "interception" of telephone messages. Finally, three witnesses testified to use and divulgence of the intercepted messages by Elkins.

The tapes were fully accounted for and the chain of evidence most complete despite efforts of appellants to discredit the chain. Their very contents attests their verity. They do not do particular credit to those whom the appellants infer would have had reason or opportunity to tamper with them, an unlikely event should testimony of those persons, in the face of the uncontroverted evidence of custody, be subject to doubt. The jury was entitled to evaluate the testimony and resolved it against the appellants. See *Davenport v. U.S.*, 9 Cir. #15689, 10/22/58.

VI. THE COURT'S INSTRUCTIONS WERE NOT ERRONEOUS.

See Point III-F herein. In addition, it is well to note that appellants contend the court erred in not giving a cautionary instruction concerning the chain of evidence.

Appellee commends to the court a reading of the voluminous transcript. Such a reading will demonstrate fully that there was nothing lacking in the established chain of evidence justifying a cautionary instruction relating thereto. The failure to give such instruction did not prejudice appellants.

VII. THE SENTENCES WERE LAWFUL AND SHOULD BE AFFIRMED.

In this connection, affirmance as to only a portion of the counts, as shown in Points II-A(1) and II-B(1), herein, will sustain the judgments.

VIII. APPELLANTS' SPECIFICATIONS OF ERROR.

No. 1(a)(b)(c)(d) and (e) are treated by Points I and II herein. No. 1(f) is covered by Point I herein.

No. 2 - 1 is treated by Appellee's Point III-A(6); Nos. 2 - 2, 2 - 3 and 2 - 4 by Point III-A(1); No. 2 - 5 by Point III-A(4), beginning at page 33 herein.

No. 3 is discussed under Point III-E herein.

Nos. 4, 5 and 6 are answered by Point III-F herein.

No. 7 is also answered by Point III-F herein, beginning at page 45.

Nos. 8 and 9 seem answered by Point III-F herein.

No. 10 is answered by Point III-F and III-G herein.

No. 11 is treated by Point III-F herein.

No. 12 is treated by Points III-A(2) and IV herein.

No. 13 is covered by the discussion in Points V and VI herein.

No. 14 is covered by Point III-H herein.

In addition to the points covered heretofore by appellee, appellants contend that the court erred in the form of verdict submitted to the jury. After a trial before a sealed jury consuming the weeks required for submission to the jury, it cannot be seriously asserted that the jury would not have written the appropriate "not" in the appropriate space as to any count or counts upon which they felt a particular defendant might be not guilty, but that the defendants would have had somehow greater protection from verdict forms in which the "not guilty" was already spelled out. Such a suggestion is an affront to those who serve our courts as jurors, sworn to well and truly find the facts in a given cause.

The form of verdict is within the discretion of the court. The form submitted was not complicated, and was proper. The court fully instructed the jury concerning the form submitted (Tr. 2524-25).

IX. COMMENT ON APPENDIX TO APPELLANTS' BRIEF.

Appellants have set forth in the Appendix their version of a thumbnail sketch of the testimony during the proceedings. Appellee respectfully submits that the editorializing and abbreviating inherent in such practice

makes the summary a poor substitute for the court's reading of the transcript and examination of the exhibits, even though the transcript is voluminous and the reading burdensome.

Appellee, however, believes it incumbent to obviate only some of the most apparent omissions or results of editorializing of significance in consideration of the evidence:

On the Motion to Suppress

Witness Wm. Langley: It should be added that the information upon which the search warrant affidavit was based concerned obscene pictures (Tr. 44, 45) and was from a police officer, which Langley thought was probable cause . . . that the affidavit set forth the source of the information (Tr. 47).

Witness Schrunk: Appellants' summary implies that the tapes were not in security at the sheriff's office. Actually they were in the safe the night of May 17 during the absence of the witness from his office (M.S. 102, Tr. 815).

Witness Sherk: The impression is left by appellants' summary that Sherk's affidavit for the federal process misstated his knowledge of the tapes being in the deposit box. Here the exact answer is important. Against a background of previous visual inspection and hearsay from those state police having access to the box, Sherk made an affidavit that he was positive the tapes were at the deposit box. He was asked (Tr. 297-98):

"You did not know of your own knowledge that the articles which you subsequently seized under

the warrant were in the box at the time that you made the affidavit; that is, of your own knowledge?"

And he answered:

"In the sense in which you have phrased that question no affiant appearing before a United States Commissioner in the Courthouse here could know of their own knowledge that anything was located at a point distant from there."

Further, appellants misstate the government's position re the acquisition under the federal search. The government's position was not that the evidence was handed over "on a silver platter", but that had it been, the appellant would have been without standing to complain, and that the addition of process in acquisition from the bank did not give appellants greater standing to complain.

Counsel acknowledged that the FBI audit of the tapes was without any knowledge that the magistrate had requested them (Tr. 356).

On the Merits

Appellants, at page 165 of their Appendix, appear to criticize the government's not calling as a witness, Brad Williams, a reporter present when Clark's house was searched. He was equally available to appellants. See *Brown v. U.S.*, 9 Cir., #15845, 11/26/58.

Appellants' summary of the testimony of the witness Anderson confuses the playing of copies of the tapes with the evidentiary tapes (Tr. 1338-41, 1364). She also testified concerning delivery of the evidence tapes to Howlett and Minielly from the District Attorney's office (Tr. 1345).

The appellants' summary of Langley's testimony at page 189 concerning his testimony in Washington, D. C. overlooks the basis of the appellee's objection's being sustained by the court, which was that a refusal to answer on claim of privilege was not a "different" answer (Tr. 1603, 1607).

Mrs. Langley's testimony is summarized as indicating the tapes she heard had a "ting-a-ling-a-ling" rather than a "buzz-buzz" sound (Tr. 3439). The summary misstates the testimony, which was that she couldn't describe the sound but that it was a "ringing sound."

X. APPELLANTS' PARADOXICAL POSITION.

Of passing interest are the paradoxical facts of this case. *Olmstead v. U.S.*, 277 U.S. 438 (1928), by 5 to 4 decision, held evidence procured by wire tap admissible in federal court. Justice Brandeis, dissenting, treated wire tapping itself an unlawful search and seizure in contravention of the 4th Amendment. He said:

"As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."

Justice Holmes in his dissent referred to wire tapping as "dirty business."

The Congressional answer to the *Olmstead* case was the statute making wire tapping a federal crime.

The appellants herein sought to suppress evidence of acts which four Justices of the Supreme Court at the time of the *Olmstead* decision condemned as an

illegal search and seizure on the basis that the acquisition by officials of the fruits of the wrongful acts was by unlawful search and seizure. Surely no case could be found better than the instant case to justify sustaining the "silver platter doctrine". This is not a situation which screams for reversal to protect constitutional freedoms. That the appellants themselves have violated the rights of others in a manner akin to that they rely upon to suppress evidence, does not entitle the government to disregard rights of the appellants, but according to the established doctrine of this circuit that was not done.

The government recognizes that human liberties are often forged in the affairs of not very nice people. Appellee does point out, however, that this is not a case which should justify reversal on the premise that hard cases make bad law—a premise which sometimes seems to justify departure from logic and precedent. To reverse the "silver platter doctrine" under these facts would be to impose hardship where none existed before.

CONCLUSION

Appellants have claimed errors in shotgun manner. The specifications of error have been fully discussed herein and the trial is submitted as without prejudice to the substantial rights of the appellants. A jury, after several weeks of trial (at which appellants rested at the close of the government's case), after reasonable deliberation of more than three hours, returned verdicts of guilty as to each defendant on each count

submitted to it. The evidence supports the jury's verdict. The court's rulings and the court's instructions as a whole were not erroneous. The appellants were entitled to a fair trial, but only one. They have had such trial. The judgment was well within authorized limits. The judgment as to Elkins should be affirmed, as should that against Clark.

Respectfully submitted,

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United States Attorney,
District of Oregon.
Attorney for Appellee.

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United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

*Appeal from the Judgment of the United States
District Court for the District of Oregon.*

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United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

*Appeal from the Judgment of the United States
District Court for the District of Oregon.*

I. PRELIMINARY STATEMENT

We believe that the issue as to "interception" is so clearly delineated and so vital to the Government's case that we have taken the liberty of discussing this point first and will thereafter reply to certain of the other contentions of the Government

II. REPLYING TO GOVERNMENT'S ARGUMENT ON INTERCEPTION

(Point III F (judgment of acquittal) and Point V (sufficiency of the evidence), Appellee's Brief, pages 44 to 50 and 51 to 53)

The keystone of the Government's case is its argument as follows: Recordings sounding like telephone conversations were seized in Clark's possession accompanied by handwritten notes on the contents in Clark's handwriting. Witnesses listened to these conversations and identified them as actual conversations held by telephone and testified that none had consented to his conversations being recorded or "intercepted"; that a hole was found in the wall between Elkins' apartment and Maloney's apartment and that Elkins and Clark made statements to the witness Erickson incriminating themselves as to "recordings of telephone conversations" at Maloney's apartment (Appellee's Br 51-53).

This is the sum and substance of the Government's case on "interception," and on conspiracy to "intercept."

There was no evidence of the "means" by which this claimed "interception" was brought about although the indictment "carefully" alleged that a

"Recording device would be connected to lines intercepting the telephone lines of Thomas E. Maloney . . ." (Tr. of Rec. Vol. I, No. 3, paragraph 2, page 11).

There was *no evidence whatsoever* of

(a) "a connection,"

- (b) existence of "lines,"
- (c) location of "lines,"
- (d) "intercepting" of Maloney's telephone wires "by lines," or otherwise.

We have read and reread the 2540 pages of transcript herein and we invite counsel on his oral argument to point out any part of the testimony or evidence which detracts from the correctness of the statements made above.

Goldman v. U. S., 316 U.S. 129, 86 L. Ed. 1322, was and is the law on this subject, and holds that to "intercept" means "taking or seizure by the way or before arrival at the destined place" and that "the listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room." (316 U.S. at 134).

The Government's argument amounts to this: Recorded telephone conversations, coupled with lack of consent, permit a finding of "interception" in the statutory sense. But recording of telephone conversations could occur or exist as a result of "eavesdropping" as well as "interception." They could be made by a wall or a room microphone as well as by some device directly and physically connected to the telephone wires, or other physical parts of the system, the means of communication intended to be protected by the statute. Therefore, in such a posture, to make out a case of

“interception,” evidence is necessary as to the *means* of “interception.”

Where, as in this case, there is no proof or evidence of the means of interception, a finding by the jury of the fact of interception cannot stand for it permits the punishment, as interception, of what is, at best, a case of eavesdropping.

At page 49 of the Government’s brief, it is asserted:

“The fact of, not means of, interception was the proof required.”

This statement is misleading because it presupposes interception in the statutory sense. It is only where statutory interception has been conceded that the means of interception becomes immaterial. The real question, under the Government’s analysis, would be “How were the recordings secured?” The Government argues they could only be recorded by “intercepting.” This *may* or *may not* be true, but not only is there *no* evidence of this assumption in the record, but there is affirmative evidence indicating the tapes were secured by a room microphone. We could just as logically argue that every sound on these tapes can be lawfully reproduced (for example, by use of a conference telephone, a very powerful wall mike, or a combination of both) but the difference is that the Government has the burden of proof.

Again, at page 48 of the Government’s brief, it says:

“A mechanical eavesdropping on a wire communication *as it passes over the wire* is, we submit, an evil Congress intended to proscribe.” (Emphasis added).

Again, it is submitted that the foregoing is illusory, and will not stand under careful scrutiny for this statement, of necessity, presupposes that the mechanical device was employed at a point where the communication was "passing over" the wire. That is to say, that it was between the telephone transmitter and the telephone receiver. There is no such evidence in the case at bar.

When we bear in mind that the purpose of the act was to protect the interstate facility (and not the privacy of communication), the above distinction becomes self-evident.

The Court, in its instruction on "interception," first pointed out that "interception" did not necessarily mean preventing the message from arriving at its destination. Then the Court committed error when it also stated, in essence, that a verdict of guilty could be returned if, while the conversation was being made, it was overheard whether by human ear or through electric devices (Tr. Vol. XV, 2502 to 2504 at 2503, quoted in Appellants' Brief at 101).

Despite the Government's ingenious exegesis of this erroneous instruction, we submit that no matter how it is read, whether taken in part or as a whole, it authorized a guilty verdict on nothing more than evidence of eavesdropping. As pointed out in our opening brief, lack of consent is not the equivalent of "interception" and we might add that eavesdropping, though not always commendable, is not, so far as we are aware, a federal offense.

We submit that the only evidence of how the recordings were obtained completely negatives the fact of unlawful interception. This testimony is found from the Government's witness Erickson (Tr. 2143):

"A. Well, I had the impression that it was a matter of these *wall* recorders picking up the sound of a telephone ringing over *here* and the sound that would be heard if I were speaking on this end and my voice was being carried to the tape recorder or wall recorder or whatever they are. I am not familiar with those.

The Court: As I understand it, that was just your impression from what went on?

The Witness: From the conversation as it took place, yes." (Emphasis added).

And again, Tr. 2167:

"Q. Was there any care exercised to avoid direct reference to telephone taps and taps—or, interception of telephone communications?

A. *There was no such conversation as to that in front of me.*" (Emphasis added).

(See also: Tr. 2104 and 2166).

The above Erickson testimony demonstrates that any alleged conspiratorial admissions made by either Clark or Elkins related only to eavesdropping recordings and since this is the only evidence relating to how the recordings were secured, the Government's speculative inference that the tapes themselves are evidence of the fact of unlawful interception, is completely unwarranted.

Lastly, we fail to follow the Government's argument (at page 49 of its brief) wherein it states:

"The indictment carefully avoided alleging that

the lines connected to the recorder were physically attached to the telephone wires of Maloney . . .”

The indictment (Tr. of Rec. Vol. I, No. 3, paragraph 2, page 11) reads in part as follows:

“It was a part of the conspiracy that the defendants would have a recording device installed . . . and that this recording *device would be connected to lines intercepting the telephone wires* of Thomas E. Maloney . . .”

What is the significance of this “careful” phraseology? Is the Government now emphasizing that the defendants had nothing to do with any installation of “intercepting” lines? That defendants connected a recorder to some existing lines? We fail to follow the Government’s argument on this point and we think it emphasizes the total failure of proof on the fact of unlawful “interception.”

III. REPLYING TO GOVERNMENT’S ARGUMENT ON THE CONSTITUTIONALITY OF SECTION 605

(Appellee’s Brief, pages 11 and 12)

The Government’s brief fails to meet appellants’ attack on § 605. It argues that a “fair reading of the statute” delineates the conduct violating the statute and that constitutionality of the statute requires no more.

It is appellants’ position that at the “face value” test (laid down by the first Nardone case, 302 U.S. 379, 82 L. Ed. 314, and the Weiss case, *Weiss v. The U. S.*, 308 U.S. 321), “any communication” means simply “any communication” and nothing less.

We believe those opinions themselves furnish the best argument in answer to the Government's charge of "strained semantics and tortured construction." (See quotations from *Nardone* opinion and *Weiss* opinion, Appendix, *infra*, page 17.)

We also find that in appellants' opening brief we quoted from *U. S. v. Harris* (Appellants' Br. 28) 106 U.S. 629, and inadvertently failed to give credit to the case of *U. S. v. Reese*, 92 U.S. 214, 23 L. Ed. 563, 565-566, from whence the Court quoted in *U. S. v. Harris*. We are returning the portion quoted in appellants' opening brief to its original context in the Appendix, *infra*, pages 17-18.

We call attention to the fact that all of the cases *but two*, cited by the Government on this point, were considering § 605 from its evidentiary aspects. The two exceptions were *Massicot v. U. S.*, 254 F.2d 58, and *U. S. v. Gris*, 247 F.2d 860. In neither of these cases was this constitutional question raised.

We have no doubt that Congress has the power, and properly may, establish *rules of evidence* for the Federal courts relating to purely intrastate commerce. We readily concede that such rules may be subject to a wide and liberal interpretation, for example, *Sablowsky v. The U. S.*, 101 F.2d 183 at 187, where the Court stated:

" * * * If the first and third clauses referred to are intended to relate to a phase of regulation as well as to constitute a rule of evidence, the limiting phrase 'interstate or foreign' placed prior to the word 'communication' in both of these

clauses was aptly used by Congress to bring such regulation within the power of Congress under the Commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3. Upon the other hand, the provisions of the second and fourth clauses of Section 605, which upon their face purport to relate to all persons, do not relate to the regulation of communication carriers and therefore constitute a rule of evidence in the purest sense. Congress must be deemed to have exercised its power within constitutional limitations. It possesses power to provide that Federal officers may not divulge intercepted *intra-state* wire communications in a district court of the United States. Such a construction limits the broad language of Section 605 in a manner consistent with the constitutional power of Congress. We therefore may conclude that such was the intention of Congress. * * * ” (Emphasis added).

The power of Congress to establish a rule of evidence for the federal courts is quite a different power from that authorizing it to make certain conduct a crime, ~~and~~ ^{where} is Congress' authority to make it unlawful to intercept and divulge "any communication" or to publish or use such intercepted communication knowing the information was so obtained, regardless of whether the communication was by wire, voice, or even smoke signals, and regardless of whether the communication was from one desk to an adjoining desk, or from San Francisco to New York? Again, we say that Congress' power is of necessity, limited to interstate communications or to matters affecting interstate systems and that § 605 is fatally vague.

IV. REPLYING TO THE GOVERNMENT'S ARGUMENTS ON SUPPRESSION OF THE EVIDENCE

(Point III A, Appellee's Brief, pages 19 to 38)

The Government argues (pages 30 to 32) that the appellant Elkins has no standing to challenge the admissibility of the tapes because he "only indirectly asserted ownership."

Counsel has apparently overlooked the motion filed in the Court below on March 25, 1957 (Tr. of Rec., Vol. I, No. XIII, at page 46) where the defendants asked that certain property "of which defendants herein are the owners, a schedule of which is annexed hereto and made a part hereof . . ." etc. The first item on the schedule was "5 electronic tape recordings." When they allege in a formal motion that they are the owners, is this "only indirectly asserting ownership"? We parenthetically observe that the Government's position is, we believe, completely answered by the case of *McDonald v. U. S.*, 335 U.S. 451, 93 L. Ed. 153, where the Supreme Court denied a similar contention of the Government by pointing out that had the motion to suppress been allowed, the evidence would not have been available for any purpose.

Next, we would like to point out that not only has the Supreme Court reserved the question decided by Judge Hastie in the *Hanna* case (*Hanna v. U. S.*, 260 F.2d 723), in the *Benanti* case (355 U.S. 96, Footnote 10), but this Court has likewise reserved the precise question now presented (see *Rios v. U. S.*, 9th Cir. 1958, 256 F.2d 173).

As stated in the appellants' opening brief, this is not a question of supremacy nor a State court interfering with a Federal court. It is the question of whether or not the State court has the right to effectively control its own officers in the execution of its process.

The Government suggests at page 34 of Appellee's Brief that the State court had "exhausted" the State's jurisdiction. Such was certainly not the view of the judge of the State Circuit Court (decision of Judge Lonergan, Ex. F, to Motion for Return, Tr. of Rec., Vol. I, Ex. B, Nos. 13 and 14, pages 66 to 70) (from page 68):

"Of course, the use of them so far has been illegal, and if the Grand Jury of this County has turned any of that material or any of those things that were taken by this illegal search warrant over to the Government of the United States, the Grand Jury had no authority whatsoever to do anything of the kind. No one has any authority to dispose of that or use it in any way without an order of the Court. No order of the Court that I know of has ever been issued to anyone for that purpose."

The Government again cites *Riggs v. Johnson County*, 73 U.S. 66 (page 28, Appellee's Brief), and urges that the Federal Court, by virtue of this holding, is free from interference by the State Court.

Our reply is to ask this Court to determine which Court is interfering with which Court? Was the State Court interfering with Federal Court by the issuance of the State Court injunction? Or was the Federal Court interfering with State Court by the issuance of Commissioner's process and the taking of the tapes from the custody of the Attorney General and the

State Police? Or by compelling the witnesses to testify and violate the announced and decided policy of the State of Oregon?

The Government asserts that the State officers were not the moving parties in this prosecution because it "was initiated by grand jury indictment" (Appellee's Brief, page 30). We can only point out that the defendants were foreclosed from inquiring as to what part, if any, the State officers did play in the institution of this prosecution by the Court's ruling on executive privilege (M.S. 452, 457, 532, 533, and as to the witness Sherk, 335, 336) (*Jencks v. U. S.*, 353 U.S. 657, 1 L. Ed. 2d 1103).

V. REPLYING TO GOVERNMENT'S ARGUMENT ON THE INDICTMENT

Point II, Appellee's Brief, pages 12 to 18)

We first note what, to the writer, seems to be an anomaly common in federal criminal practice. The Government strenuously resists a demurrer and a motion for a bill of particulars on multiple counts, and then argues that the majority of the counts are immaterial because only two counts are necessary to support the judgment and sentence. We suppose it is within the prerogative of the United States attorney to select as many counts as he wishes, to submit to the grand jury and to plead such counts in all the different alternative forms. We believe, however, that a careful reading of the cases cited by the Government will not sustain their position as to Counts II to IX, inclusive. For example, on Counts

V to VIII, the Government relies on the case of *Johnson v. The U. S.*, 207 F. 2d 314 at 319. In that case the Court was considering a statute which prohibited certain conduct in the *disjunctive* and the indictment charged the defendants in the ~~con~~^{dis} *conjunctive*. Such is not the indictment at hand, for a Clause 2 violation requires interception *and* divulgence or publication, and a Clause 4 violation requires the receipt of the communication with knowledge of the interception *and* to divulge or publish or use. We will not further reiterate our argument found at page 11, et seq. of Appellants' Brief.

The Government notes that no alibi was offered (Appellee's Brief, page 14). How could the defendants offer an alibi since no exact date of divulgence was either alleged or proved with the witnesses' estimates running from "late summer" to November of 1955.

In the case of *Norris v. U. S.*, 152 F.2d 808, cited at page 15 of Appellee's brief, the Court discusses the function of the motion for a bill of particulars. However, that case denied it, on the ground that the application had not been timely made and cited as authority for its position the case of *Tubbs v. The U. S.*, 105 F. 59 at 61. In the *Tubbs* case the Court was dealing with a prosecution for sending an obscene letter through the mails. The date of the mailing and the addressee of the envelope were given and the indictment contained the recitation that the contents of the letter were too obscene to be spread on the record. Indeed, in the *Tubbs* case the Court pointed out that the defendant might move for a bill of particulars. In the case at bar the defendants moved for a bill of particulars and the Court denied the same.

VI. REPLYING TO GOVERNMENT'S ARGUMENT RE APPELLANTS' "PARADOXICAL POSITION"

(Appellee's Brief, Point X, pages 57 to 58)

The Government argues that since Justices Holmes and Brandeis, in their dissents in *Olmstead v. U. S.* (277 U.S. 438), labeled wire tapping (in that case performed by the Government) as "dirty business" and a violation of the Fourth Amendment, therefore in cases where, as here, defendants are charged with "wire tapping," this Court should not be unduly concerned about protecting constitutional freedoms (Appellee's Brief, pages 57 to 58).

While this may be an effective jury argument, we cannot follow its logic when urged here. By the same token, is a convicted murderer appealing from a death sentence entitled to no examination of his constitutional rights simply because the jury has found that he has done to someone else what the Government is about to do to him? It seems to appellants that the Government is arguing that appellants have only "second class" constitutional rights.

We think the paradox, if any there be, is in the Government's position. This will become patent when a defendant moves to suppress evidence secured because F.B.I. agents overheard one-half or all of a telephone conversation without any evidence of an "interception." Is the Government going to confess such a defendant's motion to suppress? If so, it is reversing its position urged in *Goldman v. U. S.*, 316 U.S. 129; *On Lee v.*

U. S., 343 *U.S.* 747; and *U. S. v. Hill* (cited by the Government), 149 *F. Supp.* 83. See also, *U. S. v. Silverman*, 168 *F. Supp.* 838.

VII. REPLYING TO APPELLEE'S COMMENT ON APPENDIX

(Point IX, Appellee's Brief, pages 54 to 57)

With respect to the comments and suggestions made in Appellee's brief concerning Appellants' Appendix, we reiterate the statements made in Appellants' Opening Brief at the bottom of page 3 and at the top of page 131. We made every effort to summarize the testimony fairly and accurately and if any of our summary has had the effect of misleading the Court, we sincerely apologize.

We do point out with respect to appellee's criticism of the summary of F.B.I. Agent Sherk's testimony (Appellee's Brief, pages 55-56), that immediately after making the answer quoted by the Government, he stated:

"A. So the answer is no.

Q. The answer is no, isn't it?

A. Yes.

Q. Are you taking into consideration the fact that the last time you had seen these articles was on August the 13th immediately before September 5, 1956, isn't that correct?

A. Yes." (M.S. 298).

The original question was whether or not Sherk knew of his own knowledge that the articles seized were in the box at the time he made the affidavit and his final answer was "no."

VIII. CONCLUSION

All other matters mentioned in the Appellee's answering brief, we believe, have been adequately covered by Appellants' opening brief.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX

Nardone, et al v. U. S. (First Nardone case), 302 U.S. 379, at page 381, 82 L. Ed. 314:

“Taken at face value the phrase ‘no person’ comprehends federal agents, and the ban on communication to ‘any person’ bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employees of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena. . . .”

In *Weiss v. United States* (1939), 308 U.S. 321, 329, 84 L. Ed. 298, 302, the Supreme Court said:

“The government further contends that the Act, viewed as a whole, indicated an intent to regulate only interstate and foreign communication. The title and §§ 1 and 2, 47 USCA §§ 151, 152, with a single exception which serves to emphasize the distinction, expressly so declare. But we think these considerations are not controlling in the construction of § 605. The Commission’s regulatory powers and administrative functions have to do only with interstate and foreign communications. But § 605 delegates no function and confers no power upon the Commission. It consists of prohibitions, sanctions for violation of which are found in § 501. *We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence.*” (Emphasis supplied)

In *U. S. v. Reese*, 92 U.S. 214, at 221, 23 L. Ed. 563, at 565, the Court said, in part:

“ * * * We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then to be determined is, whether we can introduce words of limitation into a penal statute as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachment upon the reserved power of the States and the people.

To limit this statute in the manner now asked

for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment; and that the circuit court properly sustained the demurrers and gave judgment for the defendants.

This makes it unnecessary to answer any of the other questions certified. * * *''

No. 15742. ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELECTROFILM, INC.,

Appellant,

vs.

EVERLUBE CORPORATION OF AMERICA, A. R. BOOKER and
K. TAYLOR,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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No. 15742.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELECTROFILM, INC.,

Appellant,

vs.

EVERLUBE CORPORATION OF AMERICA, A. R. BOOKER and
K. TAYLOR,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The pleadings in this case consist of:

1. A Complaint for Declaratory Judgment of Invalidity and Non-Infringement of U. S. Letters Patent, and for Unfair Competition [Tr. Vol. I, p. 3].
2. An Answer to the Complaint which pleads "unclean hands" [Tr. Vol. I, p. 13] as estoppel of the plaintiff to sue.
3. A Cross-Complaint for Patent Infringement and Unfair Competition [Tr. Vol. I, p. 32]. Paragraph VII of the Cross-Complaint which was the basic paragraph

relating to unfair competition was ordered stricken on motion [Tr. Vol. I, p. 39].

4. Answer thereto, again alleging invalidity of the patent on various grounds [Tr. Vol. I, p. 41].

The basis of the District Court's jurisdiction is that this is an action by Everlube Corporation of America arising under the Patent Laws of the United States and under Sections 1338b and 2201 of Title 28, United States Code for a Declaratory Judgment and invalidity and non-infringement and unenforceability of United States Letters Patent 2,703,768. This is pleaded as Paragraph IV of the Complaint [Tr. Vol. I, p. 4] the United States Court of Appeals having jurisdiction of appeals on patent matters, notice of appeal having been filed September 26, 1957 [Tr. Vol. I, p. 102].

The plaintiff alleges [Tr. Vol. I, p. 4] that Electrofilm, Inc., is the owner of United States Letters Patent 2,703-768 issued on March 8, 1955, on an amended application filed by Ralph D. Hall on April 26, 1950, for a process of bonding solid lubrication to a metal surface. The pleadings contend that the patent is invalid for various reasons, the basic ones insofar as this appeal is concerned being a contention that the patent is invalid because the alleged invention was patented or described in printed publication and was well known prior to the issuance of the patent, the applicant not being the original or first inventor, and the second basic ground of attack as set forth in the Complaint is that the alleged invention was in public use and sale more than one year prior to the amended application [Tr. Vol. I, pp. 8 and 9].

The Answer denies the basic claims of invalidity and sets up a separate defense [Tr. Vol. I, p. 16] that the plaintiff is estopped to contest the validity of the patent

by reason of “unclean hands” in that the plaintiff’s officers and employees were former employees of the defendant and so acquired defendant’s confidential knowledge, and that the plaintiff is duplicating defendant’s formulas and processes, and offered to sell such information to competitors, and has used the formula, test data, “know-how” and customer information of defendant so obtained to compete with the defendant.

Although both the Complaint and the cross-complaint refer to charges of unfair competition, this can be disregarded since the trial judge expressed his lack of interest in this phase of the case and counsel on both sides, for practical purposes, dropped this issue during the trial. The real issue raised by the pleadings and the evidence is on the question of whether there was prior invention and discovery in public use and whether the court should have permitted the defendant to introduce evidence of “unclean hands” to estop the plaintiff from attacking the validity of the patent on the grounds urged by the plaintiff.

There is no issue in this case on the validity of any statute.

Statement of the Case.

The trial court rendered a judgment in favor of the plaintiff, adjudicating that the defendant’s United States Letters Patent 2,703,768 were invalid for anticipation under Subdivisions A, B and G, Section 102 of Title 35, United States Code, and solely by reason of such invalidity that the plaintiff did not infringe the said Letters Patent [Tr. Vol. I, p. 96]. The court based this judgment on a finding that the process disclosed and claimed in the Hall patent was known and used by others in this country, prior to the earliest date of invention thereof claimed by the

Patentee Hall, namely prior to April 13, 1946 [Tr. Vol. I, p. 91]. The court found that the process claimed in the Hall patent was known and used by Acheson Colloids who reduced the process to practice and participated in the reduction to practice by its customers, and that the process was likewise developed by Robert Burns and Wilfred E. Campbell at the Bell Telephone laboratories and that the process was in public, open and continuous use at Western Electric Company [Tr. Vol. I, pp. 91 and 92].

The court further found that the evidence in support of the foregoing findings was clear, strong, convincing and uncontradicted [Tr. Vol. I, p. 93]. The court also found that none of the patented art pleaded as anticipation disclosed the essential features of the Hall combination because none of the patented art contained the combination disclosed in the claims of the Hall patent and that insofar as the prior art was concerned that the Hall patent was a new and useful invention and the difference between it and the prior art are such that the subject matter as a whole would not have been obvious at the time the invention was made to a person having ordinary skill in the art to which subject matter pertained (35 U. S. C. A., Sec. 103) [Tr. Vol. I, p. 94].

These findings were prefaced by a lengthy opinion made by the trial court fully explaining the decision of the trial court [Tr. Vol. I, p. 51].

Although much of the trial and evidence related to prior art, the finding of the trial court that the prior art did not anticipate the Hall patent, reduces the question in the case simply to whether the Burns, Western Electric and the Acheson process anticipated the Hall process and did so by public disclosure and reduction to practice, and, secondly, whether proper evidence thereof was received by the court.

There is also the question of whether the trial court should have prevented the defendants from introducing evidence of estoppel by unclean hands. Therefore, the questions raised in the case are as follows:

1. What is the Hall process?
2. The Burns process and its distinction from Hall.
3. The Western Electric process and its distinction from Hall.
4. The Acheson Colloids process and its distinction from Hall.
5. Would unclean hands of the plaintiff constitute a defense to this action?

The foregoing points 1 to 5 constitute the basic outline of this statement of the case and the evidence bearing on these questions is set forth herein as follows:

1. What Is the Hall Process?

The Hall process is described in Plaintiff's Exhibit 1 [Tr. Vol. V, p. 1605] which is a copy of the United States Patent No. 2,703,768, issued March 8, 1955, based on an application filed April 26, 1950, which application was a continuation in part of the original application serial No. 662,099, filed April 13, 1946, which fixes the date of the invention. The Hall process is essentially set forth in claim 1, which appears in Transcript Volume V, page 1601, which is on line 23 of the patent, set forth on said page. The steps of process are as follows:

1. Treat the surface to form a large number of substantial microscopic irregularities therein.
2. Apply to the surface an abrasive-free coating mixture containing solid lubricant particles and an uncured thermosetting polymerizable resin bonding agent.

3. Cover substantially the entire surface with this mixture.

4. Bake the coating to polymerize the resin, harden the surface, and bond the lubricant particles in place on the irregularized surface.

5. The resultant coating should have a thickness under one-one thousandth ($1/1000$) of an inch.

The court's findings were [Tr. Vol. I, p. 90] that the Hall patent in suit covers a process for applying a durable dry film lubricant, the essential steps of which are:

- (a) Irregularization of the surface to be lubricated.
- (b) Application of a thin coat of liquid.
- (c) Including a thermosetting resin containing solid lubricant particles, such as graphite and solvent.
- (d) Followed by baking.

Plaintiff's principal witness John Burnham testified that the Hall patent is in the field of solid film lubricants [Tr. Vol. I, p. 124]. Solid film lubricants are used rather than oil for lubrication for inaccessible parts of machines where solid films are permanent and do not need to be renewed. They operate at high temperature where oils and grease decompose. They operate at low temperatures where liquids freeze and they operate on surfaces subject to corrosion that attacks ordinary lubricants [Tr. Vol. I, p. 125].

A film produced by the Hall process results in a permanent, dry, hard, lubricant film [Tr. Vol. II, p. 721]. The uniqueness of the Hall process is in the combination of the various steps and elements [Tr. Vol. II, p. 727]. The process teaches a pre-surface treatment of sand-blasting or phosphating, and this pre-surface treatment improves the

adhesion, increases the surface area, and provides a permanent reservoir for the solid film lubricant [Tr. Vol. II, pp. 728-729], when the film is baked on over this surface, the surface takes root over the entire microscopic area [Tr. Vol. II, p. 731].

The pre-surface treatment is such that there are no smooth, flat or plateau areas [Tr. Vol. II, p. 744]. By the use of an uncured polymerizable resin bonding agent, the baking of the resin with lubricants in it makes the film hard, and insoluble to solvents and furthermore it remains insoluble even when it contains solid lubricant particles [Tr. Vol. II, p. 748]. The Hall binder is thermosetting [Tr. Vol. II, pp. 750 and 751]. None of the prior art cited by the plaintiff contained all of the elements of the Hall process [Tr. Vol. II, p. 711].

Defendant's expert, Mr. Crump, is an outstanding authority in the field of solid film lubrication, traveling extensively throughout the country and the Hall process is the only solid film lubrication process being used today [Tr. Vol. II, p. 704].

Mr. Wiseman, defendant's witness in charge of solid film lubrication at North American Aviation, knew of no solid film lubricating coatings in 1947. Although the North American Aviation conducted an extensive exchange of information with the other aircraft companies, the first process that came to his attention was the Hall process [Tr. Vol. II, pp. 530 to 541], although there was great need for solid film lubrication in the aircraft industry at that time [Tr. Vol. II, p. 548].

The testimony of John Ringus [Tr. Vol. II, pp. 589 and 603] indicate that there was a need for solid film lubrication and that there was nothing filling the need until the Hall process was made available.

Mr. Hall, the inventor, started working on dry film lubrication in 1930, culminating in starting the dry film lubricating business in May, 1947, known as Electrofilm [Tr. Vol. II, p. 605].

2. Burns Process and Its Distinction From Hall.

The Burns process is set forth in Plaintiff's Exhibit 44A [Tr. Vol. VI, p. 1761]. This is a process that was developed by Mr. Burns when he was with the Bell Telephone Company, which is the research agency for Western Electric, the producing company in the telephone field. This process is established through Plaintiff's Exhibit 44A and the testimony of Mr. Burns which was produced through deposition [Tr. Vol. IV, pp. 1324-1355].

Mr. Robert Burns' process consisted of a mixture of graphite with black Japan which was put on a metallic surface and baked. Mr. Burns was under the impression that black Japan was thermosetting [Tr. Vol. IV, p. 1321]. He also considered his surface as being insoluble and infusible [Tr. Vol. IV, p. 1333]. However, he admits that he did not test his process [Tr. Vol. IV, p. 1328]. He said his process was tested by testing engineers [Tr. Vol. IV, p. 1337]. The film that he produced was five or ten mils thick which was thinned down by burnishing it off with a finishing tool [Tr. Vol. IV, p. 1339]. As a matter of fact, it was soft enough to be rubbed off with a paper clip [Tr. Vol. IV, p. 1360]. This process was used where there was very light contact in a switch [Tr. Vol. IV, p. 1354]. It is apparent that Mr. Burns gave no consideration whatsoever to pre-surface treatment as a part of his process. His process was used on electro-plated surfaces, but this just happened to be the surface he was working on [Tr. Vol. IV, p. 1358]. The only thing he considered important insofar as surface preparation was to

clean the surface [Tr. Vol. IV, p. 1358]. Mr. Burns testified that you got a better job when this was applied on a polished surface than on a rough surface [Tr. Vol. IV, p. 1360].

The trial judge concluded that Burns, who was not a chemist, incorrectly designated the black Japan as thermosetting, but the trial judge considered this of little significance [Tr. Vol. I, p. 81]. The evidence shows that black Japan is not a thermosetting resin but is a drying oil and any hardening of the surface that occurs in black Japan when heat is applied, is due to oxidation or burning and not to rearrangement of the molecules which is the process of polymerization that occurs in true thermosetting [Tr. Vol. III, pp. 844-860]. This is corroborated by the plaintiff's own expert [Tr. Vol. III, p. 880]. Furthermore, it appears that nobody today uses black Japans in solid film lubrication because they are made up of vegetable oils and black Japans become soluble when graphite is added and it is necessary in solid film lubrication that this film be insoluble and in this case black Japan is not permanent lubricant [Tr. Vol. II, pp. 747-750 incl.].

It is thus apparent that the Burns process did not contemplate the first three or the fifth step of the Hall process and did not constitute solid film lubrication as it is known today. While the Burns process might at first blush appear to be similar to the Hall process, it is significant that the Burns process had been refused a patent while the Hall process was granted a patent. The difference between the black Japan, and the use of thermosetting resin upon a microscopically irregularized surface, was such an advance in the art that it produced a commercially practical solid film lubricant coating for industrial uses that was insoluble to the usual solvents. Probably the greatest single advance

in the solid film lubrication field is the hardness, durability and insolubility of the Hall film over anything that was heretofore produced.

3. The Western Electric Process and Its Distinction From Hall.

The Western Electric process is the same as the Burns process and was a composition of black Japan and graphite [Tr. Vol. IV, p. 1471]. The Western Electric Company produced telephone parts which were coated with this process on the basis of specifications supplied by Bell Laboratories [Tr. Vol. IV, p. 1515]. The original Western Electric specification was in 1936 and was prepared by Mr. Burns, and is designated as Plaintiff's Exhibit 47-A [Tr. Vol. VI, p. 1812]. The specifications called for surface preparation of sandpapering, scratching, zinc plating, and some of the surfaces were acid etch [Tr. Vol. IV, pp. 1473-1475]. A reading of the specification shows that after the surfaces were cleaned as hereinbefore specified the composition of black Japan and graphite was sprayed or dipped on the part and it was then baked. It should be borne in mind that the alleged surface preparation was actually thought of solely as a cleaning operation or degreasing operation, as indicated by Mr. Burns, and not as something that had anything to do with binding the film to the surface which is an integral part of the whole process. This process at Western Electric was carried on until May 29, 1943 [Tr. Vol. IV, pp. 1476-1478, incl.]. The process as thus practiced involved no proper concept of surface preparation and no thermosetting resin. It did not produce any hard durable film because it could be scraped off with a paper clip and thickness was immaterial. Mr. Arthur M. Wagner of Western Electric testified that the Japan and graphite finish continued at Western Electric until May 29, 1943 [Tr. Vol. IV, pp. 1476-1477].

He further testified: "In about 1943 the black Japan was replaced in this compound by Beckosol No. 1303, and the high bake was discontinued" [Tr. Vol. IV, p. 1491]. He was then asked to determine if possible the identity of various piece parts which have been coated with dry film lubricating type of finish [Tr. Vol. IV, p. 1491]. He then identified various prints as having been coated with the dry film lubricating finish. It will be noted, however, that some of these prints are marked air dried and the prints themselves do not specify how the finish was applied. Some cover black Japan and some cover the Beckosol. However, when he was asked to discuss the process as he saw it at Western Electric [Tr. Vol. IV, p. 1534], he referred to armature assembly drawing 45327. This print appears on page 1822, Volume VI, Book of Exhibits. The date of this print is in the box in the upper lefthand corner of the print and shows that the print was issued April 19, 1946. This is the same date as the date of filing the Hall Application.

The testimony of the witness with respect to this part is that the surface was zinc plated, then a solution of Beckosol and graphite was sprayed on and the part baked. This is the only testimony of reduction to practice with respect to the Beckosol. It is thus apparent that the process used at Western Electric up to 1943 involved black Japan, which is not a thermosetting resin, and in 1943 the baking was discontinued, according to the testimony of Mr. Wagner, and the only testimony of the use of both baking and Beckosol involved the print dated April 19, 1946, which had been after the Hall application.

The Hall process calls for preparation of the surface to produce microscopic irregularities over its entire area and zinc plated surface does not do this, since it is just a case

of putting metal on top of metal and it generally smooths out any irregularities [Tr. Vol. II, p. 737].

Scratch brush and sandpapering does not produce microscopic irregularities but leaves extensive plateau area [Tr. Vol. II, p. 746]. Acid etch is basically a method of cleaning the surface. It leaves extensive plateau area and cannot be done on precision work because it destroys tolerances and cannot be controlled [Tr. Vol. II, p. 746]. Bright dip is merely a means of cleaning a surface and not to irregularize first [Tr. Vol. II, p. 347].

Thus, it is apparent that the Western Electric process did not teach or contemplate surface preparation to produce microscopic irregularities but on the contrary taught merely cleaning the surface by the various methods specified such as scratch brushing, sandpapering, bright dip, and zinc plating. That for a long period of time they used black Japan which is not insoluble when it contains graphite, is not hard but soft to the extent that it can be removed by a paper clip, and thickness was apparently immaterial in the Burns process.

The introduction of Beckosol again did not show any proper understanding of the necessity of pre-surface treatment and there is no evidence that any baking was done from the introduction of Beckosol in 1943 down to the date of filing the Hall patent.

The deposition of Thorliff Thorven [Tr. Vol. IV, pp. 1543-1593] merely shows the practice of the Burns process at Western Electric and therefore is as indefinite as the Burns testimony, in an attempt to prove that this is the same as the Hall process.

Dr. Wilfred E. Campbell, who was connected with the Bell Laboratories, was the man who switched Western Electric from black Japan to Beckosol [Tr. Vol. IV, p.

1379]. Dr. Campbell was engaged in research and not production [Tr. Vol. IV, p. 1401]. He considered Beckosol to be a thermosetting resin because the manufacturer called it such [Tr. Vol. IV, pp. 1402, 1403]. He said that irregularization of the surface was not a part of the process, that they did not establish such a standard as part of the process, and did not deliberately irregularize the surface [Tr. Vol. IV, p. 1404].

It is significant to note that Mr. Burns stated that electroplating the surface had nothing to do with the process and this was done to keep the surface from rusting [Tr. Vol. II, p. 735], and Dr. Campbell stated that they did not deliberately irregularize the surface [Tr. Vol. II, p. 738]. It is apparent that an attempt is now being made to claim steps that were used merely for cleaning the surface as being part of a process to irregularize the surface when nothing like this was claimed or intended and such a degreasing operation does not produce microscopic irregularities over the entire surface.

Reduction to practice of Western Electric was attempted to be proven through the deposition of Mr. Wagner, the superintendent of development engineering [Tr. Vol. IV, p. 1466] and by reference to a process that was followed in coating certain parts, prints of which were designated as Exhibits 47D [Tr. Vol. VI, pp. 1818 and 1819], 47E [Tr. Vol. VI, pp. 1820, 1821], and 47F [Tr. Vol. VI, pp. 1822, 1823]. Defendant objected to the prints at the taking of the deposition and the objections at the trial appear in Volume II, pages 495, 496, 511-514, inclusive. Objections were made to the introduction of these prints on the ground of authenticity, custodianship and accuracy [Tr. Vol. IV, p. 1496, also pp. 1497-1513, incl.]. There were other papers in the file with the drawings 47D, 47E,

47F, which were objected to in evidence and were produced by Mr. Wagner. He did not obtain them from the files but some engineer gave them to him [Tr. Vol. IV, pp. 1492, 1493]. A file was present at the deposition [Tr. Vol. IV, p. 1478]. This file was 1½ inches in thickness [Tr. Vol. IV, p. 1480]. This file was examined by plaintiff's attorney before the deposition [Tr. Vol. IV, p. 1481]. Mr. Wagner got the file from one of his engineers [Tr. Vol. IV, p. 1485]. Mr. Wagner did not know the name of the person in Western Electric who was the custodian of the file [Tr. Vol. IV, p. 1484]. He just asked one of his engineers to get the file [Tr. Vol. IV, p. 1485]. Only about 1 per cent of the papers in the file were offered in evidence [Tr. Vol. IV, p. 1537].

4. Acheson Colloids Process and How It Differs From the Hall Process.

The depositions of three witnesses were taken at Acheson Colloids, namely Alden Crankshaw, Dr. Harold J. Dawe and Morris W. Reynolds.

Morris W. Reynolds is vice president and for a long time was sales manager and general manager of Acheson Colloids whose business was, and is, the manufacture of colloidal dispersions [Tr. Vol. III, p. 1037]. Mr. Reynolds does not know of a single case where Acheson Colloids made experimental or production use of solid dry film lubrication process [Tr. Vol. III, pp. 1105-1107, incl.]. The business of Acheson Colloids was, and is, merely making up colloidal dispersions and selling these products to others for use by those others. Therefore, it is apparent that there is no Acheson Colloids process as such and the court was in error in finding that Acheson Colloids had used a process equal or anticipatory to the Hall process.

Mr. Reynolds was a biased witness and admitted that he would like to see the Electrofilm patent broken because he felt it interfered with Acheson Colloids sales [Tr. Vol. III, pp. 1101 and 1102].

Since Acheson Colloids was not doing any process work, an attempt was made to prove the use of Acheson's products by other companies. This was done by producing some 3 x 5 cards at Mr. Reynold's deposition. These cards are Plaintiff's Exhibit 40G and are found in Transcript Volume VI, page 1742. They purport to show prior reduction to practice. The evidence of lack of authenticity on these cards is clearcut. The cards were shown to him just before the deposition by Mr. Kern, plaintiff's attorney, and he was told they came from the Acheson Colloids file and he assumed this was true [Tr. Vol. III, p. 1137]. He is no longer connected with Acheson Colloids and is assuming that the cards "7A" to "7M" came from Acheson Colloids [Tr. Vol. III, p. 1138]. He personally did not select these cards [Tr. Vol. III, p. 1122]. The last time he really saw these cards before the deposition was in about 1947 or 1948 [Tr. Vol. III, p. 1123]. The secretary of the corporation is the person authorized to destroy records and all records are destroyed after seven years [Tr. Vol. III, p. 1114]. Mr. Sprague has been the secretary of Acheson Colloids since its inception [Tr. Vol. III, p. 1115]. These particular cards were not destroyed because the people on those cards are still customers of Acheson Colloids [Tr. Vol. III, p. 1120]. The information on those cards is a condensation of information obtained from the original reports and the original reports cannot be found or have been destroyed [Tr. Vol. III, pp. 1116-1117]. Cards are not kept on all customers [Tr. Vol. III, p. 1125], nor on most of the customers [Tr. Vol. III, p. 1125]. The only time they ever kept cards was

when it might be needed to obtain priorities [Tr. Vol. III, p. 1125]. He probably has cards that show that the Acheson Colloids products didn't work [Tr. Vol. III, p. 1122]. The so-called record of Mr. Heer, Exhibit 40F [Tr. Vol. VI, p. 1741] was not a part of the records of the sales department of Acheson Colloids but was a personal record of Mr. Reynolds [Tr. Vol. III, pp. 1128, 1129]. He said the only reason he happened to have this paper is that once in a while he would throw things in a drawer that might be important and this happened to be one of them [Tr. Vol. III, p. 1130].

At the time Mr. Reynold's deposition was taken, objections by defendant were made to Mr. Heer's statements on the ground of lack of authenticity [Tr. Vol. III, pp. 1059-1067]. At the time the cards [Ex. 40G] were referred to as "7A to 7M" at the deposition and numerous objections were made to the use of these cards on the lack of authenticity [Tr. Vol. III, pp. 1075-1087]. At the time of the trial, counsel objected to the introduction of the Heer statement into evidence [Tr. Vol. II, pp. 530-532] and objected to the admissibility into evidence of the cards referred to as "7A to 7M" [Ex. 40G; Tr. Vol. II, pp. 523-531] but these objections were overruled.

After Exhibit 40G was introduced into evidence at the deposition of Mr. Reynolds, he was asked to testify how the material was applied to the bomb fuse and it was objected to on the ground that it was a conclusion and no showing that Mr. Reynolds was present when the material was applied [Tr. Vol. III, p. 1087]. He was then asked if he ever saw the process applied and he stated that he saw it applied at Process Engineering [Tr. Vol. III, p. 1090]. However, the process that he saw being applied at Process Engineering involved the use of "aquadag"

[Tr. Vol. III, pp. 1136 and 1137]. "Aquadag" is merely a colloidal suspension of graphite and water [see Vol. V, p. 1737 Technical Bulletin, A. C.]. Furthermore, he did not see any pre-surface treatment except that he saw some part being dipped into a solution which someone told him was an acid bath. This is certainly not the Hall process; the use of graphite and water together being old, inferior and completely unacceptable as a solid film lubricant. This is the only actual testimony by Mr. Reynolds which purports to be eye-witness and it turns out to be a process that has no relationship whatsoever to the invention patent in suit.

Alden Crankshaw of Acheson Colloids was questioned on deposition. He stated that he saw the Acheson Colloids dispersions being applied [Tr. Vol. III, p. 1158] but stated that the parts were cleaned generally by a bright dip then the solution sprayed on the parts and then baked. He states the parts were sprayed at a thickness of under one-one-thousandth ($1/1000$) of an inch [Tr. Vol. III, p. 1159]. He said he could tell the thickness of one-one-thousandth ($1/1000$) of an inch by looking at the part and feeling it with his fingers [Tr. Vol. III, p. 1170]. This man had nothing to do with the processing in these plants but was merely selling the Acheson Colloids dispersions to these plants [Tr. Vol. III, p. 1168]. He wrote out reports on this to Acheson Colloids but all his reports have been destroyed [Tr. Vol. III, p. 1176]. It was the company policy to destroy all records after seven years and Mr. Reynolds laid down this policy [Tr. Vol. III, pp. 1176, 1177]. These customer records were in the form of large sheets of paper 8 x 6 [Tr. Vol. III, pp. 1177, 1178] and they were not cards. This man's testimony as to the nature of the chemical compositions he said he saw being

used and the process used was completely unsupported by any documentary proof.

Mr. Sprague, who was secretary of Acheson Colloids, was present all through the deposition of Mr. M. W. Reynolds [Tr. Vol. III, p. 1126].

5. Would Unclean Hands of the Plaintiff Constitute a Defense to This Action?

The defendant set up as a separate and distinct defense the fact that plaintiff was estopped to bring the action in that the plaintiff did not come into court with clean hands. This defense was pleaded in the answer as a separate defense [Tr. Vol. I, p. 16]. This was called to the attention of the court by both Mr. Kern and Mr. Young [Tr. Vol. I, pp. 105 and 114]. However, the trial judge stated that the principle of estoppel by unclean hands would not apply in an action to determine the validity of a patent, and refused to permit any evidence on this point by the defendant.

The questions involved in this appeal arose in the manner hereinbefore set forth, and the questions involved are, First, whether the court committed error in receiving into evidence Exhibits 47D, E and F, Exhibit 40G; second, do the Burns, Western Electric and Acheson Colloids processes amount to anticipation of the patent in suit and constitute prior public use and prior knowledge; and third, whether the evidence of such is sufficiently strong enough to overcome the validity of the patent in suit.

Specifications of Error.

The appellant's specifications of error have heretofore been filed in the Court of Appeals under a document designated "Appellant's Statement of Points and Designation of Record," and the specifications in error are as follows:

I.

The court committed error in receiving into evidence Exhibits 47D, E and F, which are portions of the deposition of Arthur M. Wagner, said deposition being designated Exhibit 47.

(a) Exhibit 47D.

The grounds of objection to Exhibit 47D [which appears in Tr. Vol. VI, p. 1818], and which bears the Western Electric No. P. 29484, were "that no foundation has been laid as to the authenticity or custodianship or the accuracy or the original tracing, or that it is an original tracing, or that the copy which was the thing actually being offered in evidence was a true and correct copy, and no foundation laid and not the best evidence." This objection was made at the taking of the deposition Exhibit 47D [Tr. Vol. IV, p. 1496]. These objections were reserved when the judge read the depositions [Tr. Vol. II, pp. 489 and 495]. At the time of trial the objection was again stated "that no proper foundation for the use of this record under the Business Records Act was laid, that they are not business records, and there is no authentication for the record" [Tr. Vol. II, p. 498]. During the deposition this exhibit was referred to as Exhibit C, but was changed in court to Exhibit 47D [Tr. Vol. II, p. 511]. The court overruled the objections [Tr. Vol. II, pp. 512-514].

The substance of the evidence with respect to this exhibit appears in Transcript Volume IV, pages 1492-1498. This exhibit purports to be a copy of a linen tracing. Mr. Wagner's initials were not on the tracing, he did not obtain it from the company files, but he said an engineer did. Part of the printing on the original tracing did not come through on the blueprint, and some of the letters on the blueprint were done over in pencil [Tr. Vol. IV, p. 1495]. The witness said that this part was not in production when he came to the company, but it is now in production. This of course proves nothing in the way of prior art because the fact that it is now in production proves nothing than the present time, regardless of any dates on the document. There was no testimony by Mr. Wagner that he ever used the solid lubrication process in connection with this part other than at the present time.

(b) Exhibit 47E.

The grounds of objection to Exhibit 47E [which appears in Tr. Vol. VI, p. 1820] and which bears Western Electric Nos. P 456132 and 456133 [Tr. Vol. IV, p. 1500], and questions addressed to the witness with respect to it were on the ground "It calls for conclusion of the witness, there is no proper foundation laid and calls for hearsay, and that the document is not in evidence, not the best evidence, and there is no foundation laid with respect to the document" [Tr. Vol. IV, pp. 1500 and 1501]. These objections were reserved when the judge read the depositions [Tr. Vol. II, pp. 489 and 495]. At the time of the trial the objection was again stated "That no proper foundation for the use of this record under the Business Records Act was laid, that it was not a business record, and there is no authentication for the record" [Tr. Vol. II, p. 498]. During the deposition this

exhibit was referred to as Exhibit D [Tr. Vol. IV, p. 1500]. The court overruled the objections [Tr. Vol. II, pp. 512, 514].

The substance of the evidence with respect to this exhibit appears in Transcript Volume IV, pages 1500 and 1501. It was merely that the witness testified that this is a part that is in manufacture. There is no testimony that it was ever in manufacture in the past, and there was no testimony as to any solid film lubrication being put on the part.

(c) Exhibit 47F.

The grounds of objection to Exhibit 47F [which appears in Tr. Vol. VI, p. 1821] and which bears Western Electric Nos. P 454327 to P 454330, were “that there is no foundation with respect to the document, it is hearsay, it is not the best evidence, questions addressed thereto call for conclusions of the witness [Tr. Vol. IV, p. 1509] and that it is a copy, no foundation has been laid to it, it is not the best evidence, hearsay, irrelevant, incompetent and immaterial” [Tr. Vol. IV, p. 1510]. These objections were reserved when the judge read the deposition [Tr. Vol. II, pp. 489-495]. At the time of trial the objection was again stated “that no proper foundation for the use of this record under the Business Records Act was laid, that they are not business records, and there is no authentication for the record” [Tr. Vol. II, p. 498]. During the deposition this exhibit was referred to as Exhibit D, but was changed in court to Exhibit 47F [Tr. Vol. II, p. 511]. The court overruled the objections [Tr. Vol. II, pp. 512-514].

The substance of the evidence with respect to this exhibit was that this part has been made at Western Electric but there was no testimony as to the date when it was made [Tr. Vol. IV, p. 1509], and no testimony was offered

of a dry film lubrication process being used on this part [Tr. Vol. IV, pp. 1534, 1537]. However, the date of this blueprint should be noted, which is April 19, 1946, which is the date of filing the patent application on the Hall process.

II.

The court committed error in receiving into evidence Exhibit 40G and Exhibit 40F, which are parts of the deposition of Morris W. Reynolds, said deposition being designated in evidence as Exhibit 40G.

(a) Exhibit 40G.

The grounds of objection to Exhibit 40G [which appears in Tr. Vol. V, pp. 1742-1748], at the time of trial were "that these exhibits failed in meeting the requirements of the Business Records Act . . . there was no regular practice of the company in keeping the records . . . the records were not kept under the supervision and control of the witness . . . or that the entries were made on or about the time of the transaction. . . . There is no foundation to these records to show proof of reduction to practice" [Tr. Vol. II, pp. 523-525]. At the time of the deposition, objections were made to these cards, that there was no foundation laid under the Business Records Act [Tr. Vol. III, pp. 1075, 1076], that no foundation was laid for Mr. Reynolds to testify as to anything on the cards since it was "hearsay" as to him [Tr. Vol. III, p. 1077] and it was stipulated that these objections would apply to all of the cards [Tr. Vol. III, p. 1079] and all the cards were offered in evidence subject to all of the objections [Tr. Vol. III, p. 1086]. However, at the trial all objections were overruled [Tr. Vol. II, p. 530].

The substance of the evidence appears in Volume V, pages 1742-1748, and purports to be information supplied

by salesmen of Acheson Colloids as to the fact that Acheson Colloids dispersions were being applied to metal parts for lubrication purposes and that the dispersions were baked, the parts were cleaned before application, and that this was done for dry film lubrication. That the material was sprayed on the parts and in some cases dipped on; that the film was thin and tenacious. The faults in the foundation and authenticity of these cards is fully outlined and summarized in the first few pages of the sub-heading for "Acheson Colloids process and how it differs from the Hall process" as part of the statement of the case in this brief.

(b) Exhibit 40F.

The grounds of objection at the time of the trial were "there was no proper identification of the document itself nor explanation as to the whereabouts of Mr. Heer" [Tr. Vol. III, p. 1062]. These objections were made at the time of the deposition, amongst others, and at the time of the trial it was objected to that this paper did not come from the Acheson files and lacked authenticity [Tr. Vol. II, pp. 531 and 498]. The court overruled the objections [Tr. Vol. II, p. 532].

The substance of the evidence with respect to this exhibit was that it was a purported communication by Mr. Heer to the General Electric Company in which he recommended a process of cleaning the surface, applying a resin and graphite mixture, and baking the mixture as set forth in Exhibit 40F, which appears in Volume V, page 1741. This record was not part of the sales records of Acheson Colloids, but was a personal record of Mr. Reynolds [Tr. Vol. III, p. 1128], and the only reason this paper was available was because "it happened to be thrown in a drawer" and kept by Mr. Reynolds [Tr. Vol. III, p. 1130].

III.

The court committed error in receiving into evidence testimony of Morris Brown with respect to Exhibits 47D, 47E and 47F.

The grounds of objection to such testimony was that it was stipulated that Brown would testify the same as Wagner with respect to such exhibits [Tr. Vol. IV, pp. 1442-1444] subject to the same objections. The objections to the exhibits were overruled by the trial court [Tr. Vol. II, p. 514]. The substance of the evidence with respect to these exhibits has heretofore been set forth in Specifications of Error No. 1.

IV.

The court committed error in Finding No. 9 of the Findings of Fact and Conclusions of Law [Tr. Vol. I, p. 91], in that the following portion thereof is not supported by the evidence, to wit: "The process disclosed and claimed in the Hall patent in suit was known and used by Acheson Colloids Company and various officers and employees of that company who reduced the said process to practice and participated in such reduction to practice by customers of the Acheson Colloids long prior to April 13, 1946 . . . and sold various of said composition with directions to apply them in a manner similar to the method described and claimed in the Hall patent, which has been done by its customers."

In this brief we have heretofore pointed out under the statement "The Acheson Colloids Process" that Acheson Colloids manufactured dispersions and never applied these dispersions and did not carry on or perform any solid film lubrication practice. The evidence of use by customers of Acheson Colloids was supplied by the testimony of Mr. Reynolds who said he saw a process being carried on at Process Engineering of dipping parts in acid, spray-

ing on aquadag and baking the part. But this involved the use of "aquadag" which is a combination of water and graphite. Furthermore, what he claimed he saw at Process Engineering was unsupported by any documentary proof of any kind.

The only documentary proof of using a process was the purported card records [Ex. 40G] and these cards should not have been received into evidence as they are clearly hearsay as to the use of the process, and the memoranda which purported to show the use of the process was certainly not authenticated in such a way as to produce reliability as shown by the comments thereto heretofore made in the brief.

The only other testimony with respect to reduction to practice by or through Acheson Colloids was testimony by Mr. Crankshaw, a salesman for Acheson, as to what he claimed he saw being done at various plants which was completely unsupported by documentary proof.

V.

Finding No. 10 of the Findings [Tr. Vol. I, p. 91] is not supported by the evidence in that the Finding is that the process disclosed and claimed in the Hall patent in suit was used at Bell Telephone Laboratories, prior to Hall in connection with the application of dry film lubricating compositions comprising graphite in a thermosetting resin which compositions were developed by Robert Burns and Wilfred E. Campbell and applied in accordance with the essential steps of the Hall process.

The evidence is heretofore pointed out in "Statement of the Case" shows that Robert Burns envisioned the process where there was no preliminary surface treatment as part of the process and anything that was done by way of surface treatment was merely to degrease the part. His composition was not a thermosetting resin but was black

Japan with graphite in it. Black Japan with graphite is not insoluble to its solvents and this product was soft, soluble, not durable and thickness was immaterial. The modification of this process by Wilfred E. Campbell by substituting Beckosol, still did not envision the importance of pre-surface treatment such as phosphating or sand-blasting, and the testimony of Mr. Wagner indicates that the baking was discontinued in 1943 with the introduction of Beckosol recommended by Wilfred Campbell.

VI.

Finding No. 12 [Tr. Vol. I, p. 92] to the effect that the Hall process has been in public, open and continuous use at Western Electric is not supported by the evidence in that the testimony of Mr. Wagner shows only the use of the Burns process to 1943 and the discontinuance of the baking when Beckosol was substituted in 1943 for black Japan. The attempts to support even the use of the Burns process or the Campbell modification thereof by the blueprints, Exhibits 47D, 47E, 47F, show that such testimony only related to the application of this finish at the present time of taking the depositions or after April 19, 1946, the date of the Hall patent application.

VII.

Finding No. 11, that the process disclosed and claimed in the Hall patent in suit was in public use in this country more than one year prior to the Hall application is not supported by the evidence because the use referred to in said Finding is the Burns, the Western Electric, and Acheson Colloids use, and no other.

VIII.

Finding No. 13, that the specifications issued by the Bell Telephone laboratories described the surface preparation, materials applied and the subsequent baking,

covering the essential steps of the Hall process is not supported by the evidence in that the Bell Telephone and Western Electric specifications envisioned only enough pre-surface preparation to clean the surface, whereas the Hall process included phosphating or sandblasting to produce microscopic irregularities over the entire surface. The Bell Telephone Company and Western Electric specifications originally called for black Japan and graphite, whereas the Hall process called for a thermosetting resin and graphite, the former being soluble, soft and not durable, whereas the latter was insoluble, hard and durable. The modification thereof by Campbell by use of Beckosol still did not teach the proper pre-surface treatment and the Bell and Western Electric process resulted in a thick film that had to be scraped off for necessary thickness, whereas the Hall film was under one-one thousandth ($1/1000$) of an inch when it hardened.

IX.

Finding No. 14, that the process described by Robert Burns in his patent application was the same as the process in the Hall patent is not supported by the evidence because the Burns process contemplated no pre-surface treatment to produce microscopic irregularities over the entire surface, contemplated the use of black Japan which is not a resin, instead of a thermosetting resin, and thickness of the film was considered immaterial.

X.

Finding No. 15, that the prior knowledge, use, and public use, by Acheson Colloids, Bell Telephone laboratories and Western Electric and Robert Burns, is clear, strong, and convincing, is not supported by the evidence if the objections to the documentary proof heretofore made in these exceptions is sustained.

ARGUMENT.

The Hall patent was declared invalid on the basis of prior public knowledge and use and reduction to practice. This conclusion would not be supported by the evidence, if the evidence claimed to be inadmissible were stricken. In the Acheson Colloids case it was found that Acheson Colloids knew of the invention and of its reduction to practice. All that was really done at Acheson Colloids was that a mixture of resin and graphite was developed by Dr. Dawe [Pltf. Ex. 43, Vol. III, p. 1194]. This mixture is a product. It is not a process. How does Acheson prove a process? This was done through the testimony of Mr. Crankshaw that he saw this product being used at customers' plants, his testimony being completely unsupported by any documentary proof [Pltf. Ex. 41, Vol. III, p. 1144]. Why was not the testimony of the people actually doing the process produced, rather than some hearsay witness?

Mr. Crankshaw has been with Acheson Colloids for at least the past twenty years [Tr. Vol. III, p. 1145]. He said he made numerous reports on this process [Tr. Vol. IV, p. 1176]. He was in charge of the process, but not a single documentary document connected with him was produced. The explanation was that all of the records of Acheson Colloids were destroyed after seven years on Mr. Reynolds' orders [Tr. Vol. IV, p. 1177].

Mr. Reynolds testified of only one instance when he claims he saw the process being done and in his case the solution was water and graphite [Tr. Vol. III, pp. 1090, 1136-1137]. Prior use and prior knowledge was attempted to be proved by reference to cards. The only explanation as to where these cards came from is that they were produced by defendant's counsel [Tr. Vol. III,

p. 1137]. Mr. Reynolds assumed they came from the company but he has not been with the company for several years [Tr. Vol. III, pp. 1138, 1122-1123]. The secretary of the corporation was present during his deposition and no attempt was made to authenticate the cards nor was any actual explanation offered as to how these cards happened to be in existence, when it was the practice to destroy all records relating to salesmen's reports on the process [Tr. Vol. III, p. 1177]. Mr. Reynolds gave a guess that these companies were still customers of Acheson but the practice of destroying records was based on the seven years, not whether the records did or did not belong to present customers. Although Mr. Sprague was secretary of the corporation since its inception [Tr. Vol. III, p. 115] and was present at Mr. Reynolds' deposition [Tr. Vol. III, p. 1126], and Mr. Dawe's deposition [Tr. Vol. IV, p. 1320] no attempt was made to properly authenticate the Acheson records under the Business Records Act and the request of defendant Electrofilm's counsel to take his deposition was refused. (The Acheson people's depositions were taken at Port Huron, Michigan [Tr. Vol. III, p. 1035].)

It may be argued that even if these cards are stricken that Acheson still had prior knowledge, but is it not clear that the alleged prior knowledge is based on the cards because Acheson was not using the process and therefore, the knowledge, if any, of Acheson came to it through others, if there were others.

Mr. Reynolds produced from his *personal files*, and *not from the corporate records*, a record purportedly signed by Mr. Heer, which sets up a dry film lubrication process. This is Exhibit 40F [Tr. Vol. VI, p. 1741; Vol. III, pp. 1128-1129]. Dr. Dawe of Acheson testified that Mr.

Heer's reports on this subject were destroyed as this was the policy of Acheson Colloids [Tr. Vol. IV, p. 1307].

It was held in *Teter v. Kearby*, 169 F. 2d 808, a patent appeal, that *signed* date sheets by people who conducted tests are not admissible and not proof of their contents if their existence is not authenticated. Doesn't the Heer statement come within this rule? Yet, Mr. Reynolds was permitted to testify as to what Mr. Heer told him, based on this statement, and this was held to be inadmissible in *United States v. Dupont*, 126 Fed. Supp. 27, and where no witness has testified as to the authenticity of exhibits which in a large measure represent the culling of old files and inter-office memoranda. Such records are not admissible under the Business Records Act. (*Whitman Co. v. Universal Oil Products*, 125 Fed. Supp. 137.)

The basis of the liberalized rule under the Business Records Act is the probability of trustworthiness of the records because they are the written reflections of the operations of the business, the character of the records being the earmark of their reliability. (*United States v. Smart*, 87 F. 2d 1.)

These records came from private sources. Mr. Reynolds who was no longer with the company produced the Heer statement and the defendant's attorney produced the cards. The corporate secretary, the custodian of the records, was present and refused to testify. There was not even an attempt of authentication of these exhibits. The trial judge commented on the liberal rule in the Ninth Circuit Court [Tr. Vol. II, p. 504].

I do not believe it is the policy of the Ninth Circuit Court to permit the introduction of records, as in the Acheson case, without any authentication, and I do not believe *Johnson v. Stromberg*, 242 F. 2d 793, so holds.

If the Exhibit 40F (Heer) and Exhibit 40G (Reynolds' cards) are discarded, we then find that the testimony of Crankshaw and Reynolds as to the process that they saw being carried on in the plants of Acheson's customers is unsupported by documentary evidence.

With respect to memory testimony on process application by mere bystanders who did not participate in the process, it was held in *A. B. Dick Co. v. Simplicator Corporation*, 34 F. 2d 935, that memory testimony of such delicate matters is insufficient in patent infringement suits to sustain the burden imposed in the case of defense of prior use. It should also be noted that this destroys any contention of prior knowledge of the process at Acheson Colloids. The proof of knowledge is based on proof of use. If the proof of use fails, the proof of knowledge fails. It can be said that the proof of prior use and knowledge which is based on the exhibits heretofore, comes within *Whiteman v. Mathews*, 216 F. 2d 712, that the burden of proof imposed upon a party tendering the issue of prior use is a heavy one. It is not satisfied by mere preponderance of the evidence. It is borne successfully only if the evidence is clear and satisfactory perhaps beyond a reasonable doubt. And *Washburn Mfg. Co. v. Beat Em All Barbed Wire Co.*, 143 U. S. 275, 12 S. Ct. 443, 36 L. Ed. 154, is classic in the field of contention that the evidence produced should be discarded if it is merely oral testimony not corroborated by documentary or real evidence supported in the Ninth Circuit by *Waterloo Register Co. v. Atherton*, 38 F. 2d 75; *Rown v. Brake Testing Equipment*, 38 F. 2d 220.

The plaintiff's case to establish a reduction to practice at Western Electric was done in this way: Mr. Wagner had in his possession a file and some prints. Mr. Wagner

did not know who was the custodian of the file at Western Electric [Tr. Vol. IV, p. 1484] but he asked one of his engineers to get the file [Tr. Vol. IV, p. 1485], and this engineer gave it to Mr. Wagner [Tr. Vol. IV, p. 1485]. The file was a large file [Tr. Vol. IV, p. 1480] and only about 1% of the papers therein were offered in evidence [Tr. Vol. IV, p. 1537], and these papers purported to show that Western Electric made up process specifications based on recommendations received from Mr. Burns and Mr. Campbell at Bell Telephone Laboratories. The depositions were taken in April 1957 [Tr. Vol. IV, p. 1463]. Defendant's counsel did not see the file [Tr. Vol. IV, p. 1452]. Plaintiff's counsel had seen the file and talked to Wagner and Brown before the depositions started [Tr. Vol. IV, p. 1482]. Although plaintiff's counsel himself doubted the authenticity of the foundation, no attempt was made prior to trial to establish the authenticity of the file [Tr. Vol. IV, p. 1451]. The documents produced from the file merely established that specifications were set up for the so-called Burns-Campbell-Western Electric process. Mr. Burns testified that everything he did in this connection was experimental [Tr. Vol. IV, p. 1359]. Mr. Campbell testified likewise [Tr. Vol. IV, pp. 1401, 1398]. At this point therefore we merely had the experimental declaration of specifications for this process. This of course falls far short of what is necessary to establish a reduction to practice. Therefore, reduction to practice was attempted to be established by the production of some prints of parts to which defendant objected. The prints that were offered in evidence were photostats on which alterations had been made, and they were loose papers that came into Mr. Wagner's possession from some engineer

whom he asked to get them [Tr. Vol. IV, p. 1495]. These prints appear in Transcript, Volume VI, pages 1818-1825, inclusive. These are all the prints. No objection was made to the prints on pages 1824 and 1825, since it states right on them in the upper lefthand corner "air-dried lubricating" and the prints are dated in 1951. These prints involved no baking and all after the date of the Hall application in April 1946. Therefore, they are immaterial to prove reduction to practice. The objections were to the prints on pages 1818, 1820 and 1822 of Transcript, Volume VI, which are Exhibits 47D, E and F. When Mr. Wagner testified as to reduction to practice with respect to these prints he stated that those parts were then presently being made in the plant, which of course does not establish reduction to practice prior to April 19, 1946, and the only print that he gave any detailed statement about on reduction to practice related to Exhibit 47F, which is dated April 19, 1946. Therefore, Mr. Wagner's testimony about reduction to practice shows only a reduction to practice after filing the Hall patent application. Mr. Wagner and Mr. Thovsen did testify that Western Electric practiced the Burns specification which involved black Japan, but there is absolutely no testimony that the Burns process was practiced at Western Electric after the introduction of Beckosol in 1943 and before April 19, 1946. As a matter of fact, Mr. Wagner testified that when the Beckosol came in they stopped baking [Tr. Vol. IV, p. 1491].

The prints in Transcript, Volume VI, pages 1824-1825, verified that an air-dried lubricating process was used, and air-dried is not baking. The deposition of Mr. Thovsen does not help on this point because his testimony again related to the use of the Burns process. There is

then absolutely no proof of reduction to practice of a compound using a thermosetting resin, but only proof of a reduction to practice of a composition using black Japan and graphite. There are instances in the prior art set forth in Plaintiff's Exhibit No. 3 of the use of black Japan and graphite which the court held did not anticipate the Hall patent. The Patent Office rejected Burns patent application involving black Japan and graphite as having been anticipated and not being invention. The Patent Office granted a patent to Hall using the thermosetting and graphite with the other steps of the process. All of this together with the presumption of the validity of the patent shows that the Hall process is different from the Burns. Furthermore, the Hall process is commercially successful and works [Tr. Vol. II, p. 704]. The Burns process is not in use. Even Bell Telephone Company and Western Electric have switched from the Burns process to the Hall process [Tr. Vol. II, p. 695 *et seq.*]. So that all that appears from the Burns and Western Electric process is a reduction to practice of a process that did not call for treating the surface to produce microscopic irregularities through sandblasting and phosphating, and applying a coating of thermosetting resin and graphite which is under 1/1000 of an inch, hard and insoluble.

The cases heretofore cited as to Acheson apply with equal force as to Western Electric. There is no showing that any of the Western Electric records were made in the regular course of business or were required to be kept or maintained so as to become part of the business records in the regular course of business. (28 U. S. C. A., Sec. 1732; *United States ex rel. Mathoes v. Garfinkel*, 119 Fed. Supp. 810.) Even in the case of signed records, it is necessary to at least submit preliminary proof as to the

making and keeping of records. (*Bruce v. McClure*, 220 F. 2d 330.) Corporate records are not competent against a stranger merely because they are books of the company. (*United States v. Feinberg*, 140 F. 2d 592.) Thus, a Western Electric file should not be binding to invalidate a patent simply because it is a Western Electric file. The wide-spread use of Hall and the lack of use of any other process supports the principle laid down in *Baili v. Bianchi*, 168 F. 2d 793, that before a patent can be declared invalid because of anticipation, its lack of novelty must be established beyond a reasonable doubt, and where an invention marks a substantial advance in the art, the patent is to be given a reasonably liberal construction so as to secure to the inventor the rewards of his invention.

A new combination of elements, old in themselves, but which produces a new and useful result or any diversity of arrangement of old things which introduces a new function or a new and useful method performing the old function in a new way, supports patentability. (*Expanded Metal Company v. Bradford*, 214 U. S. 366, 381, 29 S. Ct. 652, 655, 53 L. Ed. 1034, 1039; *Loom Company v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177, 1181.) If those skilled in the mechanical arts are working in a given field and after repeated efforts fail to discover a new and useful improvement, he who first makes the discovery has done more than the skilled mechanic in the art and has achieved patentability. (*Temco Electric Motor Company v. Apco Manufacturing Co.*, 275 U. S. 319, 48 S. Ct. 170, 72 L. Ed. 1025.)

By the same token, invention cannot be defeated merely by showing that, in one form or another, each element was known or used before.

The question is: "Did anyone before think of combining them in this manner in order to achieve the particular unitary result, . . . a new function?" If not, there is invention. (*Pointer v. Six Wheel Corporation* (C. C. A. 9, 1949), 177 F. 2d 153, 160.)

Lensch v. Metalizing Company of America, 39 Fed. Supp. 838, held that experimental use is never public use as to make a patent void. The prior use must in truth and fact be actually operable. (*A. B. Dick Co. v. Simplifier Corporation*, 34 F. 2d 935.)

Where the steps in a process are shown separately in several prior patents, anticipation is not established. (*Ex Parte Barton*, 51 U. S. P. Q. 145.)

The substitution of one known material for another in a known combination may amount to invention depending upon whether the step went beyond what was obvious to persons skilled in the art. (*Ellis-Foster Co. v. Gilbert Spruance Co.*, 28 Fed. Supp. 375.)

Where there was a trivial variation in the proportions of a mix and the mix was treated by a number of steps when resultant bakelite had a new characteristic in use never observed before, there is invention. (*Catalin Corporation v. Catalazuli Manufacturing Co.*, 27 U. S. P. Q. 371, 79 F. 2d 593.)

A patent on a process of chromium plating was valid because the inventor discovered that the chromium proportion was the essential point, not the chromium sulphate, and even though the prior art was able to produce occasional good plating, this did not anticipate the discovery. (*United Chromium v. International Silver*, 15 U. S. P. Q. 51, 60 F. 2d 913.)

A process of making a metal bonded abrasive article by bonding it with components and heating so a portion melts and resolidifies was not anticipated by alloys that attempted to do the same thing but did not actually do so. (*Ex Parte Boyer*, 45 U. S. P. Q. 365.)

The fact that a patent is successful, satisfies an old and recognized want, is an indication of invention. (*Ray-O-Vac Co. v. Goodyear Tire & Rubber Co.*, 45 Fed. Supp. 927.)

The uniqueness of the Hall patent rests in combining a form of surface preparation, namely, sandblasting and phosphating, that produced microscopic irregularities with a thermosetting resin mixed with graphite and solvents, that when baked on a part produced a thin hard durable lubricating surface, and which in effect created a new industry known as the solid film lubricating industry today. In spite of innumerable attempts in the past as shown by the prior patents, nothing along this line ever worked successfully. Neither Burns, Campbell, Acheson nor Western Electric understood that it was the combination of all of these things that made the invention. While some of these people sandpapered and scratched the surface, this was done solely for cleaning purposes, and this operation did not produce the essential and type of surface preparation required to hold a lubricant film.

The Hall patent teaches the importance of a surface that is completely and uniformly irregularized microscopically, and not a pre-surface treatment that either leaves deep holes like an acid etch or untouched plateau areas as in sandpapering, and the application to such a surface of a binder, to-wit: a thermosetting resin, that upon baking becomes uniformly hard even though it contains graphite

(which black Japan, thermoplastic resins, and the varnishes never did accomplish). Furthermore, it creates a film which, through the action of the thermosetting resin by polymerization, tenaciously clings to the surface even though it is less than 1/1000 of an inch. This is the Hall invention. This is the invention that is successful in industry, as shown by the calibre and quality of the ELECTROFILM licensees who are partially listed in Exhibit "R" Vol. VI, page 188.

There is no question that the defense of "unclean hands" of the plaintiff is a good defense in a suit to invalidate the patent.

Radtke Patents Corp. v. C. J. Togliabue Mfg. Co.,
31 Fed. Supp. 226.

The defense of unclean hands need not be pleaded.

Libby-Owens-Ford Glass Co. v. Sylvania Industrial Corp., 154 F. 2d 814.

The judgment should be reversed because the errors in admission in evidence was so great that if the documentary evidence falls, much of the testimony on which it is based likewise falls, and leaves the alleged reduction to practice unestablished.

Respectfully submitted,

WALTER H. YOUNG,

Attorney for Appellant.

<u>Exhibit</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
Pltf's	on page	on page	on page	on page
46E	"		"	
46F	"		"	
47	495		497	
47A	"		"	
47B	"		"	
47C	"		"	
47D	"	"	" front	497 back
47E	"	"	" "	" "
47F	"	"	" "	" "
47G	"		"	
47H	"		"	
47I	"		"	
47J	"		"	
47K	"		"	
47L	"		"	
48	496		"	
48A	"		935	
48B	"		935	
49	652	655	655	
53	862	862	862	
55	865	869	869	
57	868	869	869	
61	887	887	887	
<u>Def's</u>				
A	321		930	
B	485	485	485	
F	547	547	547	
J	585	585	585	
R	692	693	693	
S	694	696	696	

No. 15742
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ELECTROFILM, INC.,

Appellant,

vs.

EVERLUBE CORPORATION OF AMERICA, A. R. BOOKER,
and K. TAYLOR,

Appellees.

APPELLEES' BRIEF.

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No. 15742
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ELECTROFILM, INC.,

Appellant,

vs.

EVERLUBE CORPORATION OF AMERICA, A. R. BOOKER,
and K. TAYLOR,

Appellees.

APPELLEES' BRIEF.

I.
INTRODUCTION.

The appellees' brief in the above entitled action is not limited to an answer to Appellant's Opening Brief on file herein, but also includes a review of additional facts and arguments raised by appellees below concerning the validity of the patent in suit.

For brevity the exhibits of plaintiff and the cross-defendants are referred to as "PX" followed by the number of the exhibit (*e.g.*, "PX-1"), and the exhibits of defendant-cross-complainant are referred to as "DX" followed by the designating letter (*e.g.*, "DX-A"). All emphasis is ours unless otherwise noted.

II.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The complaint in this case for declaratory judgment of invalidity and noninfringement of letters patent No. 2,703,768, owned by Electrofilm, Inc., asserted jurisdiction under the Patent Laws of the United States and under the declaratory judgment section, 2201 of Title 28, United States Code [Complaint, Para. IV, R. 4], in view of an actual controversy between EverLube Corporation of America and Electrofilm, Inc., as to the validity and infringement of said letters patent [Complaint, Para. VII, R. 4-5] which resulted from a charge of infringement made by Electrofilm to EverLube [Finding No. 5, R. 90].

The answer of Electrofilm contained a counterclaim for patent infringement designated as a “cross-claim”, asserting jurisdiction under the Patent Laws [Cross-complaint, Para. V, R. 18; R. 17-22], and Electrofilm also filed a separate “Cross-claim for Patent Infringement and Unfair Competition” against the individuals A. R. Booker and K. Taylor [R. 32-39]. The Court found that this latter cross-claim also arose under the Patent Laws of the United States [Finding No. 5, R. 90], the unfair competition allegations of this pleading having been stricken on motion [R. 39-40].

III.

STATEMENT OF THE CASE.

(a) The Parties.

The plaintiff is EverLube Corporation of America, a California corporation [Finding No. 1, R. 89]. The defendant is Electrofilm, Inc., a California corporation, the owner of the patent in suit [Finding No. 2, R. 89; Finding No. 6, R. 90]. On the cross-claim of defendant, Electrofilm, for patent infringement, the cross-defendants

are plaintiff, EverLube Corporation of America, and two individual officers thereof, A. R. Booker and K. Taylor [Findings Nos. 3 and 4, R. 90].

Appellant, Electrofilm, Inc., the defendant and cross-complainant below, is referred to as “defendant” or “Electrofilm” herein, and plaintiff-appellee EverLube Corporation of America, as well as the individual cross-defendants-appellees, will be referred to collectively as “plaintiff” or “EverLube”.

(b) The Issues.

All seven claims of the Hall patent in suit were in issue and held invalid below on the following grounds alleged in the complaint, which grounds are contested here by defendant:

1. Prior knowledge or use by others in this country before the alleged invention by the patentee, under 35 U.S.C., Section 102(a) [Finding No. 8, R. 91] and particularly by Acheson Colloids Company [Finding No. 9, R. 91], Bell Telephone Laboratories, Inc., Robert Burns, and Wilfred E. Campbell [Finding No. 10, R. 91-92].

2. Public use in this country more than one year prior to the earliest filing date of the application for the patent in suit, under 35 U.S.C., Section 102(b) [Finding No. 11, R. 92], and particularly by Western Electric Co., Inc., Chicago, Illinois [Findings Nos. 12 and 13, R. 92-93].

3. Prior inventorship, under 35 U.S.C., Section 102 (g), in that, before the alleged invention by the patentee of the process of the patent in suit, the said invention was made by another, namely Robert Burns of Bell Telephone Laboratories, Inc., which prior invention was never abandoned [Finding No. 14, R. 93].

4. The Court below also found lack of invention over the processes known or used, in prior public use, or pre-

vously invented, as set forth under Findings Nos. 9, 10, 12, 13, and 14 [Finding No. 14, R. 93]. It does not appear that defendant specifically contests in its brief this portion of Finding No. 15 by the Trial Court, which states [R. 93]:

“ . . . there is no invention disclosed or claimed in the Hall patent in suit over such prior knowledge and use, public use, or invention.”

In addition to these four grounds of invalidity, plaintiff urged in its pleadings and throughout the trial below the following defenses:

5. Anticipation by prior art patents and publications, under 35 U.S.C., Section 102(a), in that the invention was patented and described in certain printed publications of others here and abroad before the alleged invention thereof by applicant.

6. Lack of invention over the prior art patents and publications, under 35 U.S.C., Section 103.

On both of these grounds of invalidity the Trial Court held adversely to plaintiff [Finding No. 17, R. 94-95]. It is believed, however, that these additional bases of invalidity previously urged below may be properly asserted on this appeal by the plaintiff without benefit of cross-appeal, since plaintiff makes no attack on the decree of the Trial Court, but merely seeks to support the holding of invalidity on these additional bases rejected by the Trial Court (*Lanova Corporation v. National Supply Co.*, 116 F. 2d 235 [C. C. A. 3, 1940]).

According plaintiff has included in the record on this appeal the prior art patents and publications introduced below and the testimony of the witnesses relating to such prior art.

Plaintiff also pleaded [Complaint, R. 10; Answer to Cross-claim, R. 45-46] and urged below [R. 106] the

invalidity of the patent in suit on the ground that it was granted as a result of misrepresentations made to the Patent Office in the file wrapper affidavits of Herman Silversher and Ralph Crump relative to the prior art Bramberry patents. Despite the Trial Court's initial attitude relative to this attack [R. 107-13], the said affidavits were the subject of considerable testimony at the trial, on which the argument was predicated that the Patent Office was led to misconstrue the said Bramberry patents by reason of the untrue allegations of said affidavits. The Trial Court however made no findings or comments in its opinion relative to this subject, which is also argued as an issue herein.

(c) The Patent in Suit.

The Hall patent in suit is entitled "Dry Lubrication Process and Product" and relates to a method of bonding solid lubricant particles, such as powdered graphite, to a metal surface so that the graphite particles will stick to the surface. The patentee accomplishes this by mixing the graphite particles into a thermosetting resinous vehicle and painting the mixture on the metal. The thermosetting resin is then set by baking.

The claims of the patent cover a process which includes the steps of preparing the surface of the metal for the application of the lubricating paint by roughening the surface, then applying the composition of graphite in the thermosetting resin in a thin film, and finally baking the composition to set the resin.

While claiming in *process* form, the patent actually relates to the *composition* which is applied and, more particularly, with the use of the *thermosetting* resin as the material for holding the graphite to the metal surface. This composition may be most readily conceived in non-technical terms as a type of coating material like a paint. Instead of color pigment found in the usual paint, there

is dispersed in the vehicle a lubricating material such as graphite in the form of fine particles [R. 125]. The problem dealt with in this patent is how to get the graphite to stick to the metal. The alleged novelty lies in the use of a thermosetting resin in the vehicle in which the graphite is suspended, which resin is set to a hard film by baking it [R. 64-65].

There are seven claims in the patent in suit: basic claim 1 and claims 2 to 7, inclusive, dependent thereon.

Claim 1 reads as follows:

"1. A process for lubricating the surface of an element that is subjected in use to mechanical friction, that comprises treating the surface to form a large number of substantially microscopic irregularities therein, applying to the surface an abrasive-free coating mixture consisting essentially of liquid and a large number of finely divided solid lubricant particles distributed within the liquid in a proportion sufficient for coating of substantially said entire surface by the particles, said liquid including an uncured thermosetting polymerizable resin bonding agent, and baking the coating to polymerize and harden the thermosetting resin and thereby tightly bond the solid lubricant particles in place on said irregularized surface, said coating having upon drying a thickness under 1/1000 of an inch."

Claims 2 and 3 are drawn specifically to the lubricant solids graphite and molybdenum disulphide, respectively; claims 4 and 5 define the specific method of surface irregularization prior to applying the lubricating paint, by phosphatizing and sandblasting, respectively; claim 6 sets forth a specific formula for the amount of lubricant particles in the liquid vehicle; and claim 7 is a product by process claim, again dependent on claim 1.

Since the patent and prior art employ various technical terms, the meaning of which appeared to merit some preliminary elucidation, plaintiff's initial efforts in the trial of the case were devoted to reducing the meaning of these terms to lay understanding through the testimony of plaintiff's expert Dr. John Burnham and explaining the purpose and function of the process of the patent in suit, as well as the meaning of the claims [R. 119-171].

Dr. Burnham explained that the patent in suit dealt with a solid lubricant film containing dry or solid lubricant materials, particularly graphite and molybdenum disulphide (also called "molybdenum sulfide" or "moly-sulfide, MoS_2 ") [R. 126], which substances have the known property of reducing friction [R. 127]. Graphite alone does not stick readily to a metallic surface, and it must be adhered with a binder which, like the vehicle of a paint, binds the particles to the surface [R. 128]. Similarly, molybdenum disulphide must be bound to the surface if substantial amounts of this material are to be adhered [R. 128].

The Hall patent deals with a process of bonding solid lubricant particles to a metallic surface using a resinous bonding agent [R. 129, PX-1, col. 1, line 46]. A resin is a noncrystalline material made of large molecules called "polymers" [R. 132-33]. Resins have a natural vegetable origin, but a large class of synthetic materials are known as synthetic resins because of their similarities to the natural resins [R. 133]. Resins are also classified as thermosetting or thermoplastic, and the Hall patent in suit discloses and claims the use of a *thermosetting* resinous bonding agent or vehicle to adhere the solid lubricant particles to the metallic surface [R. 133; PX-1, p. 1, col. 1, line 79, to col. 2, line 5; col. 2, lines 12, 18-20; claim 1, p. 2, col. 4, lines 2 and 4].

Thermosetting resins are defined as those which are converted into a hard infusible solid by the action of heat, light, or a catalyst or as defined in the *Modern Plastics Encyclopedia* for 1949:

“Having the property of undergoing a chemical reaction by the action of heat, catalysts, ultraviolet light, etc., leading to a relatively infusible state.”
[R. 134.]

A thermosetting resin, upon being heated, becomes hard and insoluble in many solvents, including the one in which it was originally dissolved, and it will not resoften upon heating again; while a thermoplastic resin is one which remains soluble after being heated and will resoften if reheated and will do this repeatedly [R. 135].

This change of state of a thermosetting resin, which occurs through polymerization, was originally known to result only upon the application of heat, but more recently other means, such as light and catalysts, were found to set certain resins [R. 134-35]. Whether the action occurs through application of heat or by catalysts, the same physical and chemical results are achieved—that is, there are formed certain three-dimensional cross-linkages between the long chain polymers of the resin resulting in an infusible material [R. 135-44].

Perhaps the most lucid explanation of the term was provided by the witness Dr. Dawe on cross-examination, wherein he stated:

“Q. (By Mr. Young): I am asking you what you understand the term thermosetting to mean?

* * * * *

“A. The term thermosetting is a fairly loose term. It is defined with different emphasis by different people. Originally in resin technology when the first synthetic resins were applied it was observed that

resins seemed to fall in two categories, those which were definitely thermoplastic, that is, when you heated them they softened and when they cooled they again hardened and again softened on reheating and so on and no permanent change, and other resins which, after they were once heated, changed to an infusible and insoluble state and which after cooling and reheating did not again become soft. Now, this difference or this property of solidification and becoming infusible on heating has been found through investigation to be the result of a certain type of polymerization which results from cross-linking and building up a three-dimensional network and such a network has the characteristics of being nonsoluble and nonfusible. There are certain resins which under the influence of certain catalysts will set up this network even though they are not baked. Other resins you have to heat to induce this reaction. Those which can be induced to form this network catalytically or under the influence of certain trace amounts of added chemical materials can also, of course, be conventionally thermoset by application of heat. In general, the important characteristic, the important property which characterizes a thermosetting resin, is one which will set up or can form this three-dimensional polymeric structure which is insoluble and infusible on the application of heat." [R. 1309-11.]

The more common synthetic thermosetting resins include phenolformaldehyde resoles, and "B" stage phenolformaldehyde resin falls within this group [R. 145]; urea formaldehyde and alkyd resins are further examples of synthetic thermosetting resins, the latter being often set by use of driers or catalysts such as cobalt naphthanate [R. 146]. Most natural resins are thermosetting, including japons which are mixtures of oils (which are con-

vertible to resins) and natural resins. These are generally thermoset by the action of heat [R. 1319], but the action may be accelerated by the use of driers [R. 147-48]. Asphaltic resins found in asphalt or petroleum residue are thermoset by heat in the presence of air when in the form of a thin film [R. 148, 1318-19].

In the Hall patent in suit the patentee suggests the use of a thermosetting resin ("B" stage phenolformaldehyde resin) incorporated into the vehicle, which is a thermoplastic resin mixture of vinyl chloride and vinyl acetate plus a plasticizer and solvent [PX-1, p. 1, col. 2, line 9]. The use of the thermosetting resin is essential to the objects of the invention recited by the patentee [R. 148-53]. The plasticizer mentioned as incorporated in the vehicle, is a chemical which softens the resin. It is not to be confused with an elastomeric resin, since a plasticizer is not a resin [R. 163]. The solvent is the liquid portion of the vehicle which acts like a paint thinner—it is the liquid in which the thermosetting and thermoplastic resin and plasticizer are dispersed [R. 163-64].

Into this vehicle the Hall patent discloses the addition of lubricating solids, graphite being preferred. In extreme cases up to ninety per cent of the graphite may be replaced by molysulfide [R. 164; PX-1, p. 1, col. 2, lines 67-81].

The application of this composition of a vehicle containing a thermosetting resin in which graphite or other lubricating solid is dispersed involves as a first step the microscopic roughening of the surface to receive the coating. This is done by conventional methods, such as sandblasting or phosphatizing [PX-1, p. 1, col. 1, lines 62-71]. This step is set forth in claim 1 as "treating the surface to form a large number of microscopic irregularities therein."

The next step is the application of the composition by any suitable means, such as spraying, dipping, or brushing. This step is claimed as follows (bracketed inserts ours):

“applying to the surface [brushing, dipping, spraying] an abrasive-free coating mixture consisting essentially of liquid [thermoplastic resin, plasticizer, and solvent] and a large number of finely divided solid lubricant particles [graphite or graphite and molybdenum disulphide mixture] distributed within the liquid in a proportion sufficient for coating of substantially the entire surface by the particles [covering the surface], said liquid including an uncured thermosetting polymerizable resin bonding agent [thermosetting resin, uncured, i.e. not yet set].”

The term “abrasive-free” simply means that no sand or grit is included in the vehicle, while the phrase “in proportion” etc. is somewhat unclear but may be interpreted to mean that the number of solid lubricant particles present are sufficient to cover the surface [R. 169]. The word “polymerizable” in the phrase “uncured thermosetting polymerizable resin” is purely redundant, since an uncured thermosetting resin is by definition polymerizable [R. 170].

After the application, the next step is baking, which is expressed in the claims “and baking the coating to polymerize and harden [set] the thermosetting resin and thereby tightly bond the solid lubricant particles [graphite] in place on said irregularized surface.”

Finally, the patentee states that the coating is under 1/1000 of an inch, by adding to the claims, “said coating having upon drying a thickness under 1/1000 of an inch”. This thickness is purely a matter of choice, as indicated

in the specification [p. 2, col. 3, lines 8-14], where the patentee states:

“ . . . Coatings applied in accordance with my invention may be made very thin so that the total thickness is only one thousandths of an inch or less, thus being satisfactory even though the tolerances permitted for the part being treated are very small. Thicker coatings, may, of course, be applied if desired.”

Stripped of the verbiage of the claims, the heart of the claimed invention of the Hall patent in suit is the use of the thermosetting resin in the vehicle in which the graphite is dispersed. As stated by Dr. Burnham [R. 170-71]:

“Q. Now, from your study of the patent in suit, could you tell us what you consider to be the gist or essence of the invention which is set forth in this claim which you have just described?

“A. Well, I believe that the gist of the invention, as indicated by the patent, is the use of this uncured thermosetting resin bonding agent in the vehicle, since the other operations which are indicated here are all indicated in the patent to be conventional steps, that is, there are conventional ways of roughening used, there are conventional ways of applying the film, spraying, painting, and so on. The baking step is conventional, since this is necessary to cure a thermosetting uncured resin, and insofar as the thickness is concerned, there is no place in the specifications which indicates that one thickness or another produces a better or a worse result, but in fact allows, as I read it, the thickness to be a matter of choice, depending on what end result one is to achieve, what application that one has.”

This is further borne out by the file wrapper of the patent in suit.

(d) The File Wrapper History of the Hall Patent.

In determining the nature of the alleged invention of the Hall patent in suit, it is important to study the long and protracted history of the application through the Patent Office.

In this case the file wrappers PX-2, 2-A and 2-B are particularly illuminating as to the alleged advance in the art claimed by the patentee. In addition, the file wrappers include by way of affidavits considerable argument and comparative tests designed to establish the superiority over the prior art process of Bramberry, the most pertinent Patent Office reference, and the differences between the Bramberry disclosures and the claims of the Hall patent.

The affidavit by Ralph E. Crump, defendant's employee, which resulted in an allowance of the application, is reprinted from the file wrapper in the appendix to this brief. The result of this affidavit was a misconstruction of the Bramberry patents by the Patent Office and a consequent allowance of the Hall patent thereover. This point will be more fully discussed under the discussion of the prior art *infra*.

The application for the patent in suit was first filed on April 13, 1946, and was abandoned after repeated rejection of the claims by the Patent Office [PX-2]. A first continuation-in-part application was filed on April 26, 1950, in which considerable new matter was added, including the use of molybdenum disulphide as a lubricating solid, as set forth in column 2, lines 74-81, of the patent in suit [PX-2, pp. 2-9; PX-2-A, p. 11]. The patentee's disclosure of the use of other organic resins, such as "silicone resins, alkyd resins and other vinyl resins" in lieu of the mixture of the copolymers of vinyl chloride and vinyl acetate with "B" stage phenolformaldehyde resin specified in the original application [PX-1, col.

2, lines 13-15], was also added in this new application filed in 1950 [PX-2, pp. 2-9; PX-2-A, pp. 2-12].

The 1950 continuation-in-part application [PX-2-A] included claims to another alleged invention which involved the use of an undercoat of low melting point metal on which the composition including graphite in a thermo-setting resin was applied. It also included claims to the process in suit, omitting the undercoat of low melting point metal. On these latter claims the application was repeatedly rejected over Patent Office reference to the patents to Larson, No. 2,466,642, McKee, No. 1,603,086, Parker, No. 2,335,958, and finally Bramberry, Nos. 2,434,880 and 2,534,406.

In arguing the first rejection, applicant stated with respect to Larson [PX-2-A, p. 24] that Larson's resins "are not *heat hardenable* compounds of the kind employed by applicant and would not serve to bond the graphite or other solid lubricant to a friction surface." "It is believed clear, therefore, that the Larson patent likewise fails to anticipate even *the gist of applicant's invention* because it does not suggest or tell how to bond graphite to a friction surface" [PX-2-A, p. 24].

After the next Patent Office rejection on the patent to McKee, applicant argued that this patent "does not include any thermo-setting type of bonding material" [PX-2-A, p. 32]. Thereafter, applicant's counsel interviewed the Examiner and filed an amendment and affidavit by Herman Silversher, Chief Research Chemist of Electrofilm, the assignee of the application. In his amendment counsel for defendant argued "that the Parker and McKee patents do not disclose compositions which are essentially thermosetting in character" [PX-2-A, pp. 38-39].

The witness Silversher in his affidavit also distinguished the prior art on the basis that it disclosed no use of a

thermosetting resin. At the trial he testified on this point [R. 361]:

“Q. (By Mr. Kern): I call your attention to pages 40 to 43 of the second file wrapper of the Hall application, Exhibit 2-A, and I will ask you if you are familiar with what is shown there, and if you would please tell us what it is.

“A. Yes, I made up—this is an affidavit, and it bears my signature. The purpose of this affidavit was to distinguish Parker and McKee and the Hall application, and that the Parker and McKee patents employed a thermoplastic resin, and the Hall composition was thermosetting, and further to show that the thermoplastic resins of Parker and McKee would not perform as well as the thermosetting resin of the Hall process.”

Subsequent to the Silversher affidavit, the Patent Office again rejected these claims, stating that:

“ . . . Applicant's argument, the Silversher affidavit and the Reprint have been carefully considered but are not persuasive that these claims are patentable over the applied references. . . .” [PX-2-A, p. 49.]

The patents to Bramberry, Nos. 2,434,880 and 2,534,406, were then, after citation by the Patent Office, the subject of a further affidavit by Mr. Silversher in which he argued that Bramberry did not employ a thermosetting resin in his binder [PX-2-A, p. 63]. However, the Examiner continued to disallow these claims, while approving claims covering the other process using the low melting point metals, whereupon applicant on April 21, 1954, filed a third application, as a division of the second, in which were included the claims to the process in suit [PX-2-B].

In this third application the Examiner again relied on Bramberry No. 2,534,406 and the patent to Bloomenthal, No. 2,085,413, in rejecting all claims. Thereafter, counsel for applicant interviewed the Examiner on three occasions in the company of defendant's expert, Ralph Crump [PX-2-B, p. 36], who subsequently to the last interview submitted the affidavit [PX-2-B, p. 51 (appendix)] which resulted in an allowance.

This affidavit was devoted to distinguishing over Bramberry and the other references cited by applicant as a result of applicant's allegedly thorough search. In so doing, Crump argued, as had been argued in the two prior applications, that none of the prior art showed the use of a thermosetting resin in the binder to hold the graphite to the metal, and that this substitution of thermosetting resins for the allegedly inferior thermoplastic resins of the prior art constituted invention.

Said Mr. Crump on this vital point:

" . . . In view of the teachings, it would certainly not have occurred to an ordinary person skilled in the art that a thermosetting resin might actually be preferable over a thermoplastic resin in a solid film lubricant, and consequently the use of such a resin by Hall amounted to an inventive advance over Bramberry. . . ." [PX-2-B, p. 46.]

After the submission of this affidavit, the patent was granted in March of 1955, nine years, ten rejections, five interviews, and three affidavits after original application therefor. It is noteworthy that, throughout this entire period of never-say-die prosecution, applicant contended that it was the use of a *thermosetting resin* in the Hall process that constituted the gist of the invention alleged and the asserted advance over the prior art [R. 171-78]. This is in counterdistinction to defendant's repeated argument during the trial of the case that the surface irregularization was a vital feature of the process

(e) Prior Knowledge and Use, Prior Public Use,
and Prior Invention at Bell Telephone Labora-
tories and Western Electric Company.

(1) The Burns Development.

Mr. Robert Burns was employed by Bell Telephone Laboratories, the research agency for Western Electric Company, from 1919 until 1954, working in the general field of organic dielectrics and plastics and evaluation and engineering use thereof, being responsible for the engineering phases of finishes [R. 1326]. In 1934, Mr. Burns was assigned the problem of making a piece of apparatus work which did not work before because of chattering and lack of a smooth enough finish between two contacting metal parts [R. 1327]. Using materials which were available in the laboratory in which he worked, Mr. Burns developed a process for permanently lubricating a surface [R. 1328], which process was made the subject of an application for patent filed March 26, 1936 [PX-44-A, R. 1761 *et seq.*] and Bell Telephone Laboratories specification LRM-2064, Issue 1, Baked Lubricating Finish, No. 495 Finish, issued February 11, 1936 [PX-44-B, R. 1788 *et seq.*].

The Burns patent application describes a process of preparing a durable permanent lubricating finish including the steps of applying a mixture of baking japan, flaked graphite, and thinner to the article to be coated by dipping, brushing, or spraying, allowing the coating to dry in air until the greater part of the solvent has evaporated and then hardening the finish by baking in an oven at approximately 400° F. for about an hour or at 250° F. for ten or twelve hours. This process produces an enduring graphitic film which is substantially nonoxidizing and is soluble only in strong acids or alkalis. It should be specifically noted that the baking process was described as necessary to polymerize the finish and

thus make it stable and enduring [R. 1772]. Mr. Burns testified that the japan which he employed was thermo-setting; that the china wood oil and the refined linseed oil in the japan imparted its thermosetting qualities [R. 1333-34]. In the Burns process, the surface of the baked finish may be burnished to reduce the thickness to the desired value, which can be done with a paper clip, but preferably with a burnishing tool. However, such burnishing does not disturb the permanent graphitic film on the surface of the part [R. 1765]. The Burns material was applied to brass, steel and zinc-electroplated steel [R. 1348].

Following two Patent Office rejections and two amendments by the applicant, the Burns application was finally rejected for lack of invention over the showing of the patents to Ridd No. 988,664 and Wescott No. 1,034,174, and the application was abandoned.

The specification based on the Burns invention, LRM-2064, Issue 1, covered a baked lubricating finish "used to impart low-friction characteristics to rubbing surfaces and requires no further attention during the life of the apparatus" [R. 1789]. The material was specified for application to surfaces which were prepared by various methods, including scratch brushing, sandpapering, and zinc plating [R. 1790]. The mixture comprised black japan, graphite, and carbon tetrachloride or mineral spirits, applied by brushing, dipping or spraying to the part which had been previously prepared [R. 1790-1791]. After drying in air, the coated parts were baked in an oven at 375° F. to 400° F. for one hour or overnight at 250° F. [R. 1791]. After cooling, the parts are burnished to leave a smooth graphitic surface exposed and adhering to the metal [R. 1792].

Metal surface preparation by scratch brushing, sandpapering, electroplating, and bright acid dipping provides

microscopic irregularities in the surface. Mr. Burns testified that zinc-electroplated steel has a fairly rough surface and that any electroplated surface has a certain amount of roughness to it that you can't avoid [R. 1348]. Dr. Burnham also testified that zinc plating produces a large number of microscopic irregularities on the surface [R. 861]. A zinc plated steel panel [PX-52] was examined by Dr. Burnham and the Court with an eighty power microscope. Dr. Burnham described the surface as containing a large number of craters and peaks and valleys uniformly covering the surface. The Court indicated that the surface looks like one "that would be induced by taking a rough steel wool and rubbing a soft metal surface" [R. 861-863]. The photomicrograph [PX-54] of the zinc plated surface confirms the results of this inspection. Both the panel and the photomicrograph were authenticated by certificates of the parties preparing them [PX-53, 55, R. 1843, 1845].

Dr. Burnham also testified that chrome plating roughens the surface of the metals to which it is applied [R. 865-867]. A chrome plated panel [PX-56] was examined by Dr. Burnham and the Court through the eighty power microscope. A photomicrograph [PX-58] of the chrome plated surface clearly shows the microscopic irregularities produced by the plating operation.

Dr. Burnham also testified that bright dip or bright acid dip on copper provides a rough surface showing craters and peaks all contiguous over the entire surface [R. 871, 872]. A copper plated panel [PX-59] which had undergone a bright dip for three minutes was inspected under the microscope by Dr. Burnham and the Court and a photomicrograph [PX-60] was provided showing the irregular surface of the panel.

Black japan is thermosetting, *i.e.*, it is a mixture of materials [R. 1764] some of which thermoset to make

the mixture permanently hard and insoluble [R. 1334, 146-148]. The testimony of Dr. Burnham on this point is particularly significant [R. 147-48]:

“Q. Are these [japans] thermo-plastic or thermo-setting?

“A. These are generally thermo-setting.

“Q. How are the japans set or cured?

“A. They are generally set by heat, but they can be accelerated—the process can be accelerated by the use of dryers and other catalysts.”

Black japan polymerizes with heat to form a three-dimensional cross-linked polymer when applied in film form producing a hard, insoluble, and infusible film which meets the requirements of a thermosetting material under any of the definitions given in this section [R. 879-80]. The mechanism of thermosetting of the black japan is different from the mechanism of thermosetting of phenol-formaldehyde in that the black japan acquires oxygen from the air in forming the cross-linkages [R. 880].

This testimony of Dr. Burnham is confirmed by the tests conducted by defendant's expert Mr. Bush, which tests are reported in defendant's Exhibit AI, which is designated as a physical exhibit and not printed in the record.

Mr. Bush's report comparing the properties of the Hall resin and black japan was analyzed by Dr. Burnham, who concluded [R. 880-82]:

“Q. I would like to refer you to Mr. Bush's report and ask you whether it appears that black japan differs materially in solubility from the Hall material listed there, when it is in film form?

“A. . . .

“In comparing these two columns together, I would say there is relatively no significant difference in the solubility of these two films.

“The only real difference shown here is that in the aromatic hydrocarbon, where it says the Burns black japan softens, but it doesn’t say it is soluble. It merely means it changes its hardness.

“Q. Well, is there anything indicated about the comparative hardness of the two films on that page? Right above what you have been reading.

“A. Well, it says—it is indicated to have toughness here. It says, ‘Above-baked films were of comparable hardness.’ So that this means, I would say *the two films are essentially of equal hardness, equally resistant to solvents, with the slight edge in the aromatic hydrocarbon for the Hall binder.*”

While Mr. Bush does not apply the term “thermo-setting” to the hardening of japans in film form when heated in the presence of oxygen, it is clear from his testimony that the same physical and chemical phenomena occur in the hardening of the Hall bonding material consisting of a mixture of “B” phase phenolic resin and copolymers of vinyl chloride-acetate and in the hardening of the black japan. Because oxygen enters into the reaction, Mr. Bush does not consider this hardening a thermo-setting action in the case of the japan, but this is merely a matter of definition [R. 833-35].

The Burns process as set out in Bell Telephone Laboratories specification LRM-2064, Issue 1, was adopted by Western Electric Company in 1936 and identified as Baked Lubricating No. 495 type Finish. See Bell Telephone Laboratories specification LRM-2064, Issue 1 [PX-44-B, R. 1788 *et seq.*], correspondence between Bell Telephone Laboratories and Western Electric [PX-46-A, B, C, D, E, F, R. 1806-11], and Western Electric Company specification for No. 495 type Finish [PX-47-A, R. 1812 *et seq.*].

The Western Electric Company planned to use the process on eight thousand parts per year in 1936 [R. 1809].

While the Burns *application* for patent was abandoned, it is clear from this and subsequent specifications and uses (to be discussed *infra*) that the Burns "*invention*" was never abandoned.

(2) The Campbell Development.

Wilfred E. Campbell is a scientist and a specialist in the fields of lubrication, prevention of metal tarnishing, and analytic chemistry, having been engaged in these fields since 1926. Dr. Campbell was employed at Bell Telephone Laboratories from 1926 to 1954 working in the research department [R. 1371-74].

During 1934 and 1935, Dr. Campbell's department was involved in the same emergency research work on solid lubricant coatings as Mr. Burns, the problem being to find as rapidly as possible a suitable lubricant film for the contact finger of a new cross-bar switching system [R. 1375-76]. A number of various materials were tested, including a product of Acheson Colloids Company known as "Varnodag". Varnodag contained colloidal graphite dispersed in a phenolformaldehyde resin and was sprayed onto the surface and baked thereon. The Varnodag provided very long life and reduced the friction appreciably, but not quite as low as desired by the project engineers [R. 1377].

A new mixture was subsequently prepared by Dr. Campbell comprising an alkyd resin known as "Beckosol" and graphite [R. 1379]. A series of mixtures using various percentages of graphite in this resin were prepared, applied to steel plates, baked, and then tested for wear and friction. The tests indicated that a mixture of approximately fifty parts of resin and fifty parts of

graphite by weight provided the "desired properties of low friction as well as long life" [R. 1380-81]. These compounds were applied to panels which had previously been treated with an abrasive cleaning method using an abrasive known as levigated alumina, the compounds being thereafter applied by spraying [R. 1382]. The coatings tested were in the order of one-half of one thousandth of an inch [R. 1381-82].

Beckosol is an alkyd resin of the thermosetting type which is thermoset by baking [R. 1380]. Dr. Campbell knew that Beckosol was thermosetting from his tests [R. 1406] as well as from the manufacturer's specification [R. 1403]. However, Beckosol may also be hardened or set by the addition of catalysts or driers which speed up the polymerization of the thermosetting resin making it harden or set at room temperatures [R. 1383, 893].

In further testing his compositions, particularly to ascertain the comparative merits thereof as against the Burns black japan binder, Dr. Campbell applied lubricating compounds on steel plates, utilizing Beckosol and graphite which were set at elevated temperatures. He also applied coatings of Beckosol with a catalyst and graphite which were set at room temperature, and lubricating coatings of the type developed by Mr. Burns [R. 1379-84].

After the films were hardened, the various panels were tested for friction and wear life. Dr. Campbell's tests indicated that the friction of the three compounds was of the same order, while the wear life of the three materials varied slightly, with the baked Beckosol composition having the longest wear life [R. 1383-84].

In 1934 or 1935, Dr. Campbell developed a composition consisting essentially of liquid and a large number of finely divided solvent lubricant particles distributed

within the liquid in a proportion sufficient for coating of substantially the entire surface by the particles, which liquid included an uncured thermosetting polymerizable resin bonding agent. After application of the composition to a surface, the article was baked to polymerize and harden the thermosetting resin and thereby tightly bond the solid lubricant particles in place. The resultant coatings had a thickness of under one one-thousandth of an inch. This composition was abrasive free but was applied to surfaces which had previously been treated by an abrasive cleaning method [R. 1391-93].

On January 3, 1938, a revised specification LRM-2064, Issue 2 [PX-45-A, R. 1793 *et seq.*] was issued by Bell Telephone Laboratories, superseding Issue 1 of the same specification [PX-44-B], which set out the Burns process previously discussed. The new specification retained the Burns process designated Baked Finish No. 495 and included, in addition, the Campbell process utilizing Beckosol and a catalyst, which process was identified as Lubricating Finish, Air Dried No. 517 [R. 1387].

On August 9, 1943, Issue 2 of the specification was superseded by Issue 3 [PX-45-B, R. 1800 *et seq.*]. In this specification, the Campbell composition utilizing Beckosol, a catalyst, and graphite is substituted for the Burns composition utilizing black japan, a thinner, and graphite in Baked Finish No. 495. The mixture of Beckosol thermosetting resin, drier-catalyst, solvent, and graphite was found suitable for use both for polymerizing the resin at elevated temperatures by baking and at room temperatures [R. 1388-89, PX-47-C, R. 1817].

In summary, Issue 1 of the Bell Telephone Laboratories specification was effective during the period February 11, 1936, to January 3, 1938. This issue specified only the Burns black japan baked on coating process, which was identified as Finish 495. Issue 2, effective January 3,

1938, to August 9, 1943, specified both the Burns coating as Finish 495 and the Campbell Beckosol with catalyst air dried coating as Finish 517. Issue 3, effective from August 9, 1943, to date, specified the Campbell Beckosol composition for use both as a baked on coating, Finish 495, and an air dried coating, Finish 517, the Campbell coating substituting for the earlier Burns in Finish 495.

Dr. Campbell saw his composition in use in approximately 1940 at Western Electric on the armature of a relay where wear and impact were severe [R. 1390].

Thus, it is seen that Dr. Campbell developed and successfully reduced to practice a process including all of the steps of the Hall process long before Hall's alleged invention thereof, and the Campbell process was never abandoned.

(3) Use of the Burns Process in Production at Western Electric Company.

Arthur M. Wagner, who holds a doctor's degree in Chemical Engineering, has been employed by the Western Electric Company from 1929 to the present. He originally worked in the organic finishing department, which is concerned primarily with paints, varnishes, and lacquers, and is now Superintendent of Development Engineering and still has charge of organic finishes [R. 1466-71].

Dr. Wagner identified Western Electric Company's specification for Baked Lubricating No. 495 type Finish [PX-47-A, R. 1812 *et seq.*], which sets out the Burns process as discussed above and corresponds to Bell Telephone Laboratories specification LRM-2064, Issue 1 [PX-44-B, R. 1788 *et seq.*]. Dr. Wagner saw the lubricating finish including black japan and graphite in use in 1937 and 1938 at the Western Electric Plant. The material is applied pursuant to the specification both by brushing and by spraying. Some of the parts were acid etched prior to application, and some were zinc plated.

The Burns process as exemplified in the No. 495 type Finish was continued in use at the Western Electric Plant until 1943 [R. 1469-77, PX-47-C, R. 1817, PX-47-I, J, K, L, R. 1827-37].

Mr. Morris Brown, a chemical engineer, has been employed by the Western Electric Company since 1923 and was Dr. Wagner's predecessor as Department Chief of the Finishing Group, Organic and Inorganic, holding that position from 1936 to 1939. Mr. Brown is presently Assistant Superintendent of Operating, manufacturing cross-bar switches [R. 1411-17].

It was stipulated by counsel for both parties that Mr. Brown, if asked about witnessing the application of finishes compounded of black japan and graphite and their application on parts made at Western Electric, would testify to the same effect as had Dr. Wagner [R. 1418].

Mr. Thorllif Thovsen has been employed by the Western Electric Company in Chicago as a sprayer from 1925 to the present. During the period 1937 through 1941, Mr. Thovsen applied a coating consisting of a mixture of black japan, graphite, and a thinner to an average of *one thousand pieces a month*. After spraying and air drying, these parts were baked in ovens at 300° to 350° F. for one to two hours or more. This mixture was applied to the parts shown on plaintiff's Exhibits 47-G and 47-H [R. 1824, 1825]. Prior to going to work as a sprayer, Mr. Thovsen worked in the zinc plating department. The parts to which the graphite-black japan mixture was applied were zinc plated. The spray room where Mr. Thovsen mixed the materials and sprayed the parts was open to other employees and visitors, and he was never instructed to maintain any of his information secret [R. 1543-69, 1574].

Furthermore, defendant in its opening brief admits that the Burns process as exemplified by Finish No. 495 was in use at the Western Electric Plant until 1943 [Brief, pp. 10-12].

(4) Use of the Campbell Process in Production at Western Electric Company.

As discussed *supra* in connection with the Campbell process and the testimony of Dr. Campbell, Beckosol was substituted for black japan in the No. 495 Baked Lubricating Finish in 1943. The evidence previously discussed is corroborated by the testimony of Dr. Wagner [R. 1476-77, 1490-91] and inter-company correspondence [PX-47-C, R. 1817]. Plaintiff's Exhibit 47-C, dated May 29, 1943, states that black japan was no longer used as a vehicle for the No. 495 Baked Lubricating Finish and the Beckosol No. 1303 specified for the No. 517 Air Dried Lubricating Finish was now employed for *both the air dried and baked finishes*.

Dr. Wagner testified that he recognized the parts illustrated in Plaintiff's Exhibits 47-D and 47-F [R. 1818, 1822] as parts which were used in communication equipment manufactured by Western Electric [R. 1497, 1509]. He further testified that he had observed the parts shown in Plaintiff's Exhibit 47-F being processed at Building 32-4 of the Hawthorne Plant of the Western Electric Company where the lubricating mixture was applied to the surfaces marked "X" on the drawing [PX-47-F] by spraying, the surfaces being zinc plated prior to spraying. Following the spraying, the parts were baked in ovens in the same building at temperatures in the order of 330° or 350° F. At one time the baked part was burnished, while at another time the burnishing step was omitted. The thickness of this particular coating was in the order of three thousandths of an inch; however, there was no specification on the maximum thickness,

since it did not matter in connection with this part [R. 1533-37].

Plaintiff's Exhibits 47-D, 47-E, 47-F, 47-G, and 47-H [R. 1818-25] are prints of tracings made by the Western Electric Company's blueprint room at Dr. Wagner's request, by Western Electric personnel. The tracings from which the prints were made were produced by Dr. Wagner and were compared with the prints by Dr. Wagner and counsel for defendant. The tracings are regular Western Electric Company working drawings and are customarily kept in the company files and were obtained from the files at Dr. Wagner's request. Dr. Wagner identified the tracings and the prints as being made and used in the regular course of business of the Western Electric Company [R. 1492-1501, 1506-11]. It should be noted that these drawings did not come from the one and one-half inch thick folder of papers repeatedly referred to by defendant in its opening brief.

It is felt that any lack of continuity in Dr. Wagner's testimony is due to the continuous and lengthy interruptions and objections interposed by counsel for defendant. For example, see the record starting at 1469 and at 1477, where the witness is completely distracted by interruptions. This procedure continued throughout the Wagner deposition, as well as in the Brown, Reynolds, Crankshaw, Buck, and Thovsen depositions. It is plaintiff's contention that such interruptions went far beyond that required of diligent counsel and were designed to distract the witnesses and counsel and obscure the testimony.

In considering the following discussion relative to the Western Electric drawings, Plaintiff's Exhibits 47-D, 47-E, and 47-F [R. 1818, 1820, 1822], it is suggested that the Court may wish to view the original exhibits, as the photoreproductions in the record are on a reduced scale resulting in loss of legibility of some of the lettering thereon.

Plaintiff's Exhibit 47-D shows a blade and collar assembly, No. P-294484. As indicated in the upper left corner, the drawing was issued as Issue 1 on November 3, 1939, and Finish No. 495-A was not then specified thereon. The drawing was changed and reissued as Issue 2 in its present form on June 21, 1940, calling for "bright acid dipped and baked lubricating 495-A finish."

Dr. Wagner testified that the 7-B telegraph key on which this blade and collar assembly is used *is still in production* [R. 1498]. It should be noted that in 1940, Baked Lubricating 495-A Finish was covered by specification LRM-2064, Issue 1 [PX-44-B, R. 1788 *et seq.*] which embodied the Burns process. 495-A specifically relates to application of the mixture to a surface without prior preparation of the surface by the party applying the mixture [R. 1790]. However, the drawing [PX-47-D] which specifies this 495-A Finish *also specifies that the part shall be bright acid dipped before application of the finish*, thereby providing the microscopic irregularities on the surface prior to application of the mixture.

In 1943 the Campbell process using Beckosol was substituted for the Burn's process using black japan in the Baked Lubricating 495 Finish, and under Issue 3 of LRM-2064, the baked lubricating finish specified on the drawing required the Beckosol resin [PX-45-B, R. 1800 *et seq.*]. Thus, it is seen that both the Burns process and the Campbell process were used in production on the part shown in Plaintiff's Exhibit 47-D, and in both instances the composition was baked after application to a roughened surface.

The drawing of Plaintiff's Exhibit 47-E was issued October 12, 1936, as indicated in the upper left corner thereof. Reference to the note headed "Issue 3" indicates that, when the drawing was reissued as Issue 3 on June 29, 1939, the requirement for nickel chromium plate was deleted, and zinc plate and 517 air dried lubricating finish

were substituted therefor. It will be recalled that the 517 air dried finish was first specified in specification LRM-2064, Issue 2 [PX-45-A, R. 1793 *et seq.*] and embodied the Campbell process using Beckosol and a catalyst, so that the finish would polymerize and set at room temperature.

Reference to the upper left corner of drawing P-454327 to P-454330 [PX-47-F, R. 1822] indicates that Issue 10 of this drawing was issued on April 13, 1946, which corresponds exactly to the earliest date of invention alleged by the patentee Hall. On that date the drawing was "redrawn without change" from the earlier issue, Issue 9. Thus this drawing on its face is a continuation without change of the drawing which existed prior to April 13, 1946, namely Issue 9. At the present time, the parts shown on this drawing are zinc plated and provided with 289-A finish, which finish is not pertinent to the present action. However, as indicated in the note under Issue 12 (upper left corner), prior to March 31, 1947, the date of said note, the finish called for on these parts was zinc plate 289-A finish and baked lubricating 495-A finish. It will be recalled that, after 1943, 495 baked lubricating finish called for Beckosol [PX-45-B, R. 1800 *et seq.*].

Thus, these three drawings of Plaintiff's Exhibits 47-D, 47-E and 47-F corroborate the previously discussed testimony that the processes at Western Electric using black japan and subsequently Beckosol, *the latter both baked and air dried*, were known and in public use at Western Electric prior to Hall's alleged invention thereof.

This evidence is further corroborated by the testimony of Mr. Brown, it having been stipulated that Mr. Brown would testify in the same manner as Dr. Wagner with respect to Plaintiff's Exhibits 47-D, 47-E, 47-F, 47-G, and 47-H [R. 1444], these exhibits having been identified

in the depositions as Plaintiff's Exhibits C, D, E, F, and G, respectively.

Plaintiff's Exhibits 47-G and 47-H [R. 1824, 1825], the testimony of Dr. Wagner [R. 1510-11], and the testimony of Mr. Brown [R. 1444-48] establish that the Campbell process is still in use today. The Western Electric Company has taken a neutral position in this litigation, has made its facilities equally available to both parties, and its employees were represented by their own counsel, Mr. C. B. Hamilton, resident Patent Attorney at the Hawthorne Works, Western Electric Company, during the depositions [R. 1481-82].

(f) Prior Knowledge and Use and Prior Invention at Acheson Colloids.

The depositions of four witnesses were taken at Acheson Colloids, namely, Morris W. Reynolds, Alden Crankshaw, Percy C. Buck, and Dr. Harold J. Dawe.

Acheson Colloids Company is a division of Acheson Industries, Inc. and is in the business of manufacturing colloidal dispersions of solids in fluids and semi-fluids, having been in this business under several different names since 1908. These dispersions comprise various solids, such as graphite, molybdenum disulphide, talc and zinc oxide, in various liquids, such as water, petroleum oil, resins and alcohols, which dispersions are employed by purchasers from Acheson for lubrication coatings, electrically conductive coatings, and for other purposes [R. 1037-40].

The Acheson salesmen are technically trained men who are given the title of and function as service engineers. The object of their position is to work with the customer, understand his problems, and show and explain to him how the Acheson products should be used and why they are beneficial. The actual taking of orders is not considered of importance in the selling philosophy [R. 1181].

(1) Development and Use of "Varnodag."

Mr. Reynolds is a vice president of Acheson Industries, Inc. and has been employed by Acheson or its predecessors since 1926. During the period 1932 to 1953 he was Sales Manager [R. 1037-38].

During the period 1934 to 1941 Acheson produced and sold continually a product comprising graphite dispersed in a thermosetting phenolformaldehyde resin, which was known as "Varnodag" [R. 1044-45]. The trademark Varnodag was registered on January 1, 1935 [PX-40-C, R. 1734], and the product is described in Acheson Technical Bulletin No. 230.1 [PX-40-B, R. 1731 *et seq.*] which was issued and copyrighted in 1934 [PX-40-D, R. 1735].

Mr. Reynolds testified that a Mr. Heer, a salesman for Acheson under Mr. Reynolds' supervision, discussed with Mr. Reynolds in 1940 the approach to a solution of a problem presented by the General Electric Appliance Company, who sought a suitable coating material which would provide a dry film having lubricating properties to be applied to the switch of an electric toaster. Mr. Reynolds and Mr. Heer recommended the use of Varnodag and applied this material to parts furnished by General Electric [R. 1063-67].

This testimony is corroborated by a written report from Mr. Heer to Mr. Reynolds dated June 7, 1940 [PX-40-F, R. 1741] setting out the details of the treatment applied to the parts furnished by the General Electric Appliance Company. Two groups of the parts were treated as follows: the surface was prepared by sanding, a solution of Varnodag in a solvent was applied to the surface, and the material was then baked. In one of these groups, the material was washed with acetone between the sanding and application of Varnodag. Mr. Reynolds identified the report as one which he had received from Mr. Heer.

Mr. Reynolds also identified the signature to the report as that of Mr. Heer, which signature he had seen hundreds of times [R. 1059-60]. Since defendant's counsel expressed doubt that Mr. Heer was employed by Acheson at that time [R. 1062], Mr. Heer's personnel records at the Acheson Company were also introduced as evidence [PX-40-H, 40-I, 40-J, R. 1749-57] with Mr. Heer's signature appearing on the original Exhibits 40-I and 40-J.

The original of the Heer report was placed in the general records of the company and Plaintiff's Exhibit 40-F, which is a signed copy, was retained in Mr. Reynolds' personal file in his office to be used primarily in preparation of comprehensive sales treatises [R. 1128-30].

Mr. Crankshaw who is now Sales Manager of Acheson Colloids Company, started with the company in 1932 as field representative service engineer [R. 1145]. The company first started selling dispersions of solids such as graphite in thermosetting resins for use as dry film lubricants in 1933, the product being known as Varnodag [R. 1146]. Mr. Crankshaw testified as to specific customers who used Varnodag as a dry film lubricant, including Clarostat Manufacturing Company, Brooklyn, New York, Bell Telephone Laboratories, and Ward-Leonard Electric Company, Mt. Vernon, New York [R. 1147-51].

Mr. Buck, now a vice president of Acheson Industries, started with the company in 1919 and in 1932 was Superintendent in charge of production [R. 1184-85]. One project which Mr. Buck was in charge of in 1932 was the development of a suitable dispersion of graphite in a resin such as a bakelite thermosetting resin, which was requested by the sales department [R. 1185]. After some development work, a dispersion consisting of graphite in a resin purchased from the Bakelite Company which was a "B" stage phenolformaldehyde resin, was developed

and given the name Varnodag [R. 1187, 1191-92]. This product was tested by applying it to steel, brass and glass plates by brushing and by dipping, following which the plates were placed in an oven and baked. The Varnodag consisted of a liquid which included an uncured thermosetting polymerizable resin and finely divided solid lubricant particles and provided a hard, smooth, thin coating on baking. The coatings were applied of a thickness just sufficient to cover the surface of the plates. The standard production tests for smoothness, lubricity, and adhesion were applied to these panels [R. 1187-90].

The above testimony establishes that Varnodag, a mixture including a thermosetting resin and finely divided graphite, was applied to metal surfaces which had previously been prepared by irregularizing, the parts being baked to harden and set the resin and provide a smooth film in the order of one thousandth of an inch thick.

(2) Development and Use of Dag Dispersions 35, 38 and 47.

In 1941, Varnodag was replaced by three new products identified as Dag Dispersions No. 35, No. 38, and No. 47, which products are still being marketed by Acheson, as shown by their 1956 catalog Plaintiff's Exhibit 40-A [R. 1042-1044, 1727 *et seq.*].

Dr. Dawe is Research Director for Acheson Industries and has been with the company full time since 1940, having worked with the company as a part-time worker prior to that date [R. 1194-1196]. Dr. Dawe was working in the laboratory at Acheson in 1941 when a problem was presented to the laboratory to develop a dry film composition which would have excellent hardness and good lubricity for use as a rust preventive and lubricating coating. Dr. Dawe testified that Mr. Heer, the same Heer previously discussed, suggested that the laboratory investigate alkyd resins and investigations were initiated using Beckosol 1313, a product of Reichold Chemical

Company [R. 1210-1211]. The laboratory investigations resulted in the development of dispersions 35, 38, and 47 which were combinations of graphite, alkyd resins and aromatic petroleum naphthas, the latter being solvents. Beckosol 1313 was used in dispersion 35 and Beckosol 1303 was used in dispersions 38 and 47. Both Beckosol resins are thermosetting polymerizable resins. 1313 must be baked at an elevated temperature to harden and set. 1303 may be hardened and set at room temperature or by baking [R. 1197]. Dr. Dawe personally worked on the development and testing of these three materials and his dated laboratory notebooks were introduced as Plaintiff's Exhibit 43-A [R. 1198-1221]. The laboratory notebooks have not been printed in the record but have been designated as a physical exhibit.

Mr. Crankshaw testified that sale of dispersions 35, 38, and 47 started in small quantities in 1941 and built up to volume products during the war years. Specifically, he recalled that these products were used by seventy-six different manufacturers of bomb fuse gears commencing in 1941 and continuing through V.J.-Day. The dry film lubricating coatings were used on these parts, because ordinary lubricants would freeze at the low temperatures at high altitudes. The witness identified eleven particular companies in his personal territory at which the dispersions were used in the coating of bomb fuse gears [R. 1152-57].

He specifically described the process of application of the dispersion to gears at the Lux Clock Corporation in Waterbury, Connecticut, where he personally observed the process many times prior to 1945. The gears, which were of brass, were first given a bright dip, sometimes called a bright acid etch, and, after rinsing and drying, were mounted on a rotating table which contained individual spindles for each gear. The gears themselves were rotated so that the parts were exposed to the spray

of material from four separate spray guns. The parts passed through the spray area and on to the drying operation, following which they were dismounted from the conveyor and placed on another conveyor and went through a bank of twenty infrared lamps where they were baked. The parts were rotated while being sprayed to obtain a complete coating while keeping the thickness of the coating down to a point where it would not interfere with the clearance when the gears were assembled in their unit. The thickness of the coating was specified as less than one thousandth of an inch, and his observations of the finished products indicated that the film was not more than one thousandth of an inch thick [R. 1158-62]. The witness visited these plants manufacturing bomb fuse gears in a consulting capacity [R. 1172] and observed daily performance tests of the assembled bomb fuses [R. 1163].

It is significant to note that a specification of the Gillan Company [DX-J, R. 1877 *et seq.*] indicates that bright dip is the required pretreatment for copper and copper alloy parts prior to application of dry film lubricants under the Hall patent.

Mr. Reynolds also testified that dispersions Nos. 35, 38, and 47 contained alkyd thermosetting resins with graphite as the lubricating solid dispersed therein. These materials were sold during the war for use on bomb fuse gears to somewhat in excess of fifty manufacturers [R. 1069-72]. The witness specifically described the process which he personally observed in the plant of Process Engineering Company in Chicago between 1942 and 1944. Mr. William Fisher was proprietor of this company, and his process was described by the witness as including the steps of precleaning, acid etch, mounting the gears on the turnstiles, applying the spray, putting them through the baking cycle, and, of course, assembly later on [R. 1090-92, 1134].

The oral testimony of these witnesses who observed the application of these dispersions to bomb fuse gears was further corroborated by a plurality of cards from a company file maintained for war-time material priority purposes, which cards were made from salesmen's reports in the regular course of business by employees under Mr. Reynolds' direction and control, Mr. Reynolds being Sales Manager at the time these cards were being made [R. 1073-76]. Thirteen cards from the file which indicated use of the 35, 38, and 47 dispersions by customers of Acheson were introduced into evidence as Plaintiff's Exhibit 40-G [R. 1742 *et seq.*]. The notations on the cards were interpreted by Mr. Reynolds as indicating that these dispersions were used extensively in production and coating of bomb fuse gears and other parts with dry film lubricant compositions which were in many cases baked on [R. 1077-86].

The cards comprising Plaintiff's Exhibit 40-G were part of a record compiled and maintained during the second World War when the company was badly in need of priorities. The cards were compiled from salesmen's reports by office personnel of Acheson Colloids when the report indicated that Acheson products were being used by a customer who could supply a priority rating [R. 1117-21]. This file was no longer maintained current after 1947 or 1948, although the witness had occasion to look up in the cards a use of material a year or two prior to taking of his deposition [R. 1123-24].

It is clear that Acheson products comprising thermo-setting resins containing graphite were applied by Acheson customers to parts which had previously been irregularized by bright acid dip, the application being by spraying, following which the parts were baked to harden and set the resin. Not only was this process for employing their material known to Acheson personnel, but it was actually

suggested and taught by Acheson to their customers, particularly in the war time bomb fuse gear program.

Prior to the initiation of the present suit, the defendant sought to license Acheson under the Hall patent to cover the dispersions including 35, 38, and 47 which Acheson had been manufacturing and selling continually since 1941 [R. 1095-99, 1102].

(g) The Prior Art Patents and Publications.

Plaintiffs' prior art patents and publications relied upon at the trial were introduced to show that each individual step of the Hall process was old in the art of bonding graphite or lubricant solids to metal surfaces, including the particular step which was asserted to be novel during the prosecution of the application, namely the application of the graphite in a thermosetting binder. Plaintiffs also established that the *combination* of steps was old in the art, not only in the Bramberry patents [PX-3, R. 1692-1708], which the Patent Office was led to misconstrue by the Crump affidavit [Ex. 2-B and appendix], but also in other pertinent patents and publications not cited by the Patent Office in the prosecution of the Hall patent in suit.

In reviewing this prior art herein, an effort will be made to group the references which disclose each of the various steps of the process in issue and to discuss separately the Bramberry patents which were the subject of considerable testimony and comparative tests at the trial.

(1) History of the Art.

As a preliminary to his explanation of the prior patents and publications relied upon by the plaintiff, Dr. John Burnham summarized the history of the art of dry film lubrication in order to provide a better over-all picture of the alleged advance in the art made by the patentee.

Dr. Burnham's testimony on this point is believed to be of such interest that it is reproduced in the appendix furnished herewith.

(2) Surface Preparation.

The first step in the Hall patent claims comprises irregularization of the surface. The purpose of such irregularization is to produce microscopic hills or valleys in order to obtain increased adhesion. An irregular surface provides larger surface area, as well as the requisite reservoir areas to hold the solid film lubricant [R. 167-68, 728-30].

This irregularization may be accomplished in a number of ways, as by ordinary sandblasting or by phosphatizing by well known processes as suggested by the patentee [PX-1, col. 1, lines 62-67]. Other methods of surface irregularization which are commonly used are chemical etching, oxide coating, anodizing aluminum, plating with porous zinc or chromium, honing, scratch-brushing, grit-blasting, etc. [R. 167].

Different metals often call for different presurface treatments to create the irregular surface prior to the application of the coating. This is clearly shown in the specifications of North American Aviation Inc. [DX-F, R. 1864] and the specification of Gilfillan [DX-J, R. 1880-81] which were introduced into evidence to prove infringement by plaintiffs in the application of coatings under these specifications.

All of these different surface treatments are conventional in the application of any coating, as in the application of paint to metal, where it is desired to obtain good adherence [R. 168, 550, 885-887, PX-61, R. 1849]. Hall, as a journeyman painter, was long familiar with the desirability of such presurface preparation of metals prior to painting [R. 646-50].

Not only is this first step of surface irregularization conventional in the prior art, but it is specifically disclosed in a number of prior art patents in the specific art of dry film lubrication.

The prior art patents to Thomson [R. 1616, p. 1, line 112, to p. 2, line 14], Aluminum Colors [R. 1627, p. 2, lines 47-57, 99-106], Work [R. 1642, p. 1, col. 2, lines 52-55], Koch [R. 1684], and Bramberry No. 2,534,406 [R. 1692, col. 4, lines 38-53, col. 9, lines 21-44] all disclose the desirability of irregularizing the surface prior to applying the dry film lubricant coating [R. 239].

The patent to Thomson, No. 1,481,936 [PX-3, R. 1616], which Dr. Burnham discussed by way of example [R. 188] exemplifies a disclosure of this character, wherein the patentee states:

“Astonishingly adherent graphitic films can thus be applied to paper, tin-foil, lacquer, buffed brass, hand scraped surface plates and highly polished hardened steel, such as needles. Hence, when the application is made upon relatively rougher machined or ground surfaces which, as microscopically viewed, present a vast aggregation of ‘hills and valleys’ the latter function as graphitic reservoirs and furnish a fresh supply as and when the obtruding ‘hills’ are elided. These imprisoning ‘valleys’ may be augmented in depth and area, as by etching, knurling or wire-brushing.” [p. 1, line 112, to p. 2, line 14.]

The Trial Court in its opinion, speaking of the Thomson patent, apparently overlooked this portion of the disclosure [R. 59].

(3) Application of Thermosetting Resins Containing Lubricant Solids.

The essence of the alleged invention of Hall, namely the application of a composition including a thermosetting resin containing a lubricant solid, such as graphite or

molybdenum disulphide, was found in the patents of Bergl [R. 1619], McLintock [R. 1623], Stuart [R. 1651], Wilkey [R. 1661], Mahle [R. 1665], Greth [R. 1673], Menking [R. 1686], and both Bramberry patents [R. 1689 and 1692]. Of these only the Bramberry patents were cited by the Patent Office [R. 238-39]. Of these noncited patents, Wilkey, Greth, and Menking were most heavily relied upon by plaintiff to establish the antiquity of this basic inventive advance claimed by Hall. The patents to Bloomenthal [R. 1633] and Wescott [R. 1610] were also cited to establish the prior application of such a thermosetting composition for analogous purposes.

The Wilkey patent No. 2,284,785 [R. 1661], shows the application to a prepared surface of a clutch plate of various compositions containing graphite and molybdenum sulphide in a binder [R. 198-99]. In some cases the composition is applied to reduce frictional wear and in other cases to increase friction [R. 1661, p. 1, col. 2, lines 38-42], the composition in the latter case only, including abrasives such as silica. Several examples of thermosetting resin binders, natural and synthetic, are given by Wilkey.

One example disclosed is phenolformaldehyde resin, which is a thermosetting resin, in a suitable solvent, in which is incorporated graphite and molybdenum sulphide [R. 1661, p. 2, col. 1, lines 37-40, 54-58; R. 197]. This composition is applied to a surface which has been indented or recessed to form minute pockets which act as a reservoir for the materials, and the composition is then baked to set the resin [R. 197]. As stated by Wilkey [R. 1661, p. 1, col. 2, lines 48-52]:

“ . . . This mixture is made into a pasty mass, which is then filled into the pockets until flush with the outer surface of the plate, where it is heated and allowed to harden or set. . . .”

A coating one ten thousandth of an inch thick is formed on the plate [R. 1661, p. 2, col. 1, lines 7-11]. This coating contains the lubricant solid in the polymerized resin [R. 1661, p. 2, col. 1, lines 59-64]:

“An examination of the glaze produced on the clutch plate from the compositions described above shows that it consists of highly polymerized hydrocarbons which represent the binder, graphite, and molybdenum and sulphur in the proportions of molybdenum sulphide. . . .”

The binder of Wilkey was asserted in the defendant's chart Exhibit W not to include the use of a thermosetting resin. However, on cross-examination defendant's expert, Mr. Crump, admitted that Wilkey did show the use of a thermosetting resinous binder, and that the defendant's notation relative to this patent on the chart was based on the contention that Wilkey did not apply the thermosetting material to the surface, but only into the recesses in the surface [R. 792-93].

The German patent to Greth [PX-3, R. 1672] is very clear in its disclosure of a thermosetting resin binder incorporating graphite, which composition is baked in to provide a lubricating coating [R. 207-14].

The Greth disclosure initially recites the fact that finely divided graphite dispersed in vehicles such as varnishes, wood oil, or synthetic resins to form lubricating coatings has been known, as shown in the German patent to Bergl, No. 466,104 [R. 1673]; that the patentee found that a certain class of phenol or amine condensation resins “*capable of being hardened*” had superior properties for this purpose [R. 1674].

He then enumerates various binders tested, including some thermoplastic and certain thermosetting materials, and finds that a particular lubricating varnish of the invention achieves superior results [R. 1675, 212-14].

This binder is a thermosetting resin, namely a phenol-formaldehyde resole with a plasticizer added. It is described as follows:

“ . . . a plasticized phenol resin, capable of being hardened, which is obtained from a phenol resole, capable of being hardened. . . .” [R. 1675.]

Greth indicates that to 77 parts of this binder, 50 parts of graphite and 22 parts of xylol (solvent) are added to form the composition claimed, which is then baked in at 180° (356° F.) for one hour (as compared with a baking temperature of 350° F. for the phenol-formaldehyde resin in the Hall patent) [R. 1676].

The Greth patent translation [R. 1676] includes an error in German translation of “eingebrannt”, which in this context should be translated as “baked in”, rather than “burnt in”. On this point the witness Dr. Burnham who reads scientific German [R. 122] testified [R. 211]:

“The Court: Eingebrannt means to burn.

“The Witness: Eingebrannt means to burn but it also may mean baked.

“The Court: It can be used as ‘baked in’?

“The Witness: Yes. And ‘baked’ makes more sense because he indicates a temperature of 180 degrees Centigrade, which is the temperature at which this material *will not burn*. It is thermosetting infusible resin which will withstand this temperature and hence the translation ‘baked’ is in order.

“The Court: When a translator interprets from a foreign language into the English language they ordinarily do not know the legal terminology and sometimes they translate a word that does violence to the language.

“Mr. Kern: Your Honor, this is probably unnecessary in view of your knowledge of the German

language, but I would just like to ask the witness whether he finds the word 'baked' in the German-English dictionary for chemists.

"The Witness: Under this word in the dictionary, following the translation, 'equivalent translations: burn, calcine, roast, distill, fire, *bake*.'

"The Court: All right."

There was no contrary evidence whatsoever relative to this translation. Nevertheless, the Court in its opinion [R. 61] analyzed this patent around the erroneous translation "burnt in" and came out with the novel theory that, since the resin was employed with a solvent [which is true in all the prior art and the Hall patent as well], there was only an evaporation process here and no "setting" of the resin. According to the Trial Judge, this evaporation is followed by "burning in" to remove the last traces of the solvent from the coating. This discussion of the Greth patent by the Trial Court is highly erroneous from a technical viewpoint, and it is entirely contrary to *all* the evidence in the case, including that of defendant's own experts.

Mr. Crump, defendant's witness, who constantly belittled the prior art patents, nevertheless testified relative to the Greth patent on cross-examination as follows [R. 795-96]:

"Q. (By Mr. Kern): You did find in the Greth patent that a thermosetting resin was employed, did you not? Look at your chart.

"A. Yes.

"Q. That is a thermosetting resin containing graphite particles?

"A. Yes, he included graphite.

"Q. The graphite is applied in the thermosetting resin for the purpose of lubrication?

“A. Yes.

“Q. And he bakes on, does he not?

“A. 180 degrees C.

“Q. Now, in your opinion does the indication of a baking step following the application of a synthetic resin containing graphite provide any indication whatsoever as to whether or not the synthetic resin might be considered thermosetting or thermoplastic?

“A. Well, if he bakes this it would indicate to me that he might have in mind a thermosetting resin.”

It is therefore clearly established, with no evidence to the contrary, that the prior art in the dry film lubrication field shows the application of the graphite in a thermosetting resin vehicle followed by baking to set the resin. This is the very essence of the Hall invention as disclosed, claimed, and prosecuted for nine years through the Patent Office.

Another prior art patent clearly showing the use of a thermosetting resinous vehicle containing graphite, which composition is thereafter baked in, is the patent to Menking, No. 2,385,718 [R. 1686].

This disclosure is concerned with a particular article, namely a shuttle, which is coated over that portion of the external surface where wear occurs due to contact with the yarn. The coating is applied to minimize friction resistance and must be adherent under impact [R. 1686, p. 1, col. 2, lines 10-25]. The patentee suggests that, for this purpose, “synthetic resins, particularly the thermosetting resins, such as one of the group consisting of the phenol formaldehyde, urea formaldehyde, melamine formaldehyde, and phenol furfural types, are especially adapted to this use because of their superior resistance to wear, strength, flexibility, and smoothness at operating temperatures” [R. 1686, p. 1, col. 2, lines 27-34].

The patentee then suggests that, with this resin, there may be incorporated graphite to improve the properties of the coating [R. 1686, p. 2, col. 1, lines 17-27], and he claims in claim 7:

“7. A shuttle comprising a body of magnesian metal and a coating thereon consisting of a mixture of a thermosetting resin and graphite, said coating covering at least a portion of the external surface of said body.”

(4) Other Pertinent Prior Art.

The patent to Wescott, No. 1,034,174, issued in 1912 [R. 1610], is the earliest United States patent showing the application of a thermosetting resin containing graphite, which is then cured in place upon the application of heat.

The Wescott patent describes a “Method of Treating Iron or Steel Articles” to form an acid-resistant protective coating on such articles. Wescott employs for his coating composition a vehicle comprising a japan in which is incorporated graphite, which is then baked at 300° F. for one hour and forty minutes [R. 1610, p. 1, lines 29-47; R. 183-84]. This vehicle is a thermosetting resin [R. 184]. The patentee claims:

“1. The method of treating surfaces of iron or steel, which consists in applying to such surfaces a composition containing noncoalescing electric-furnace graphite and a suitable vehicle, and thereafter baking the article.”

This patent does not specifically disclose the use of the coating applied as a lubricant film. Nevertheless, the process employed to achieve the coating, including the essential step of applying a thermosetting vehicle, which is thereafter cured or set on the metal article, is clearly disclosed. Thus, although Mr. Robert Burns strenuously

argued at a later date on his own application that Wescott did not show a process for making a lubricating finish and therefore was not anticipatory [R. 1774, 1784], the Examiner repeatedly held that the Burns process was unpatentable thereover.

In the prosecution of the Hall patent in suit, however, ten years later, the Wescott reference was never cited [PX-2, 2-A, 2-B].

The prior art literature cited by plaintiffs includes an article appearing in the German text of 1943 by Englisch [PX-12, R. 1709], which constitutes a disclosure of the application of a synthetic varnish binder containing graphite to a roughened surface followed by baking [R. 1711]. This process achieves “high adhesiveness” of the film, “resistance to abrasion”, and “insolubility in lubricating oil and liquid fuels” [R. 1710].

Such process as described would constitute to anyone skilled in the art a disclosure of the use of a thermosetting resin binder, by Mr. Crump’s own admission that the baking step following the application of the synthetic resin indicates a thermosetting resin [R. 796].

The National Advisory Committee Technical Note No. 1578 [PX-14, R. 1711] indicates the knowledge in the art, prior to 1950, of the superiority of molybdenum disulphide as a lubricating solid over graphite [R. 1714].

(5) The Bramberry Patents Nos. 2,470,136 and 2,534,406.

These patents were copending and may be considered together, as they incorporate by reference in each the specification of the other and disclose a combination of all of the steps of the Hall patent in suit.

Bamberry No. 2,470,136 teaches a process for applying the metallic surfaces, such as engine cylinders, pistons, and piston rings, a coating of solid lubricant material,

namely graphite, tenaciously bonded to the surface of the metal [R. 1689, col. 1, lines 1-17; R. 219]. The coating composition consists of a resin binder with solid lubricant particles and phosphoric acid dispersed therein [R. 219]. The binder used is described as follows [R. 1689, col. 2, lines 45-49]:

“In the above formula, the binder is preferably a resin and may be of the class of petroleum or vegetable residue pitches, it being understood, however, that any suitable binder may be employed.”

The ratio of graphite to binder specified is in the range of from 3 to 1 to 2 to 1 [R. 1689, col. 3, lines 66-68].

In applying this composition the patentee first prepares the surface in accordance with the method described in the copending 2,534,406 patent [R. 1689, col. 5, lines 53-57] by cross-hatched honing to provide recessed scratches of a depth of .0002" [R. 1692, col. 4, lines 37-43; col. 9, lines 11-20], which provides a large number of microscopic recesses or irregularities in the surface [R. 223, 225]. Another method of irregularization, by electrolytic etching of chromium surfaces, is also specified [R. 1692, col. 9, lines 21-31].

After this initial surface preparation, Bramberry sprays the surface with the liquid containing the resinous binder with the graphite and phosphoric acid dispersed therein, air dries, and then bakes the film at from 400° to 600° F. [R. 1689, col. 4, lines 39-50; R. 221-22] to harden the film. The film thickness is from three ten thousandths to one one thousandth of an inch thick [R. 1689, col. 4, lines 57-58; R. 222].

The phosphoric acid present in the composition of Bramberry reacts with the base metal to form a phosphate on the metal, and the resin binder with the graphite in it is bonded to that surface [R. 335]. As a result, the Bramberry surface is also irregularized in the same manner as indicated in the Hall application, where phosphating is employed for surface preparation [R. 332, 1689, col. 5, lines 20-27].

The argument of defendant that the phosphoric acid in Bramberry's composition, rather than the binder, serves to bond the graphite to the metal surface represents an impossible situation, since the phosphate crystals can form only on the surface of the metal where the acid contacts the metal [R. 884-85]. Thus the addition of the phosphoric acid in Bramberry merely accomplishes in one step what Hall effected by two separate steps. As indicated by Dr. Burnham [R. 882]:

“Q. Now, referring to the Bramberry patents, could you tell me in your opinion what difference there is between the preparation of the surface in Bramberry, as compared to the preparation of the surface in the Hall process, where phosphating is the first step in the Hall process?

“A. Well, I think the main difference is that Bramberry does essentially in one step what Hall does in two steps, namely, in the Hall there is a phosphating step first, prior to the application of the lubricant. In the Bramberry case the phosphate and the binder—I mean, and the lubricant film are applied at the same time, in the same step.

“Q. Does Bramberry perform a phosphate coating at the surface of the metal or elsewhere?

“A. At the surface of the metal, yes.”

The primary basis of distinction of the Hall process over Bramberry asserted by defendant was the resin binder. It was on this alleged basis of distinction, so strenuously urged in the Patent Office by defendant's employee Crump, that the Hall application was finally allowed in the Patent Office.

Accordingly, at the trial Mr. Crump asserted unequivocally that the class of resins, namely vegetable and petroleum residue pitches, taught by Bramberry was not thermosetting in character [R. 750]. In view of his affidavit submitted to the Patent Office during the prosecution of the case, Mr. Crump could hardly take a different position as an employee of defendant at the trial.

However, Mr. Bush, who testified as a chemical expert for defendant, did *not* exclude thermosetting resins from this general class of resins specified by Bramberry [R. 827-50].

Defendant's third witness, who testified relative to the Bramberry patents, over plaintiff's objection on this occasion, was the patentee Hall. He admitted on cross-examination that asphalt (a petroleum residue pitch) hardened upon heating and "set" [R. 681-82].

He also characterized the asphalt as a *thermosetting* pitch which upon initial softening flowed into the irregularized surface formed by the reaction of the phosphoric acid with the metal in the Bramberry process [R. 682].

The testimony of Dr. Burnham and Dr. Dawe, both highly qualified chemists, indicates that the class of resins specified by Bramberry for his binder included thermosetting resins [R. 220, 1227-28]. Both of these witnesses

performed tests and cited authorities to establish the fact that, when heated to polymerization temperature, certain of these resins, both vegetable and petroleum residue types, became hard and insoluble and, when thereafter heated, do not resoften [R. 1313-14, 1318-19, 220, 287, 873].

The fact that asphalt coated on a metal plate and heated to 600° F. is not thereafter soluble in toluene, the original solvent in which it was thinned, was demonstrated by Dr. Burnham in the court room [R. 875]. Nor does the asphalt, once heated in the film to this temperature, soften on reheating [R. 875]. The addition of graphite to the asphalt cannot, as suggested by Mr. Crump, affect this thermosetting action by preventing the oxygen of the air from entering into the reaction, since graphite does not take up oxygen from the air until it is heated to a much higher temperature than 600° F. [R. 876-79].

Bramberry indicates that he bakes in those instances where a particularly hard adherent film is desired [R. 1689, col. 5, lines 13-19].

This is indicative of the intention to employ a heat hardenable or thermosetting resin [R. 228-29]. Moreover, in Bramberry No. 2,534,408 [R. 1703, col. 5, lines 12-26], which is a continuation-in-part of the '406 Bramberry patent, the patentee, after describing the use of a thermosetting resin binder of phenolformaldehyde resin, which is baked at 350° F. to 500° F., indicates that this binder, "as well as those described in my co-pending applications Serial Nos. 555,377 and 555,378 now Patent #2,470,136 . . . are insoluble in water and usual lubricating oils and are

resistant to heat and the chemical action of combustion and of detergent oils.”

So Bramberry himself ascribes to the binders of the '136 and '406 patents the properties of infusibility and insolubility which also characterize the synthetic thermosetting resin employed in the later Bramberry patent.

It thus appears that all of the evidence, both by demonstrated tests and oral testimony of the experts (with the sole exception of Mr. Crump), as well as the patentee, establishes that Bramberry's disclosure of “any suitable binder”, “preferably a resin” which “may be of the class of petroleum or vegetable residue pitches” which is baked to harden the resin, encompasses the disclosure of thermosetting resins.

(h) The File Wrapper Affidavits Re Bramberry Patents.

The question naturally arises why, in view of the disclosures of the aforesaid Bramberry patents, the Patent Office issued the Hall patent in suit. The answer is found in the file wrapper affidavits of Silversher and Crump, in which it was asserted first that Bramberry's disclosure did not embrace the use of a thermosetting resin [PX-2-A, pp. 63-66; PX-2-B, pp. 38-51 (Appendix)], and secondly that Bramberry's thermoplastic resin did not achieve the results obtained with Hall's thermosetting resin as shown in test results set forth. On the basis of these arguments and numerous interviews, the Patent Office was finally prevailed upon to issue the Hall patent.

On examination of the facts alleged in these affidavits, however, the witnesses Dr. Dawe and Dr. Burnham both

pointed out that the reasons given by Crump in support of the argument that Bramberry disclosed only thermoplastic resins were technically erroneous, and that the tests performed were not scientifically capable of proving the results claimed [R. 232-38, 1233-39, 1247-48].

The affiant Silversher, over stern warning from the Trial Judge, admitted that he had erred in his affidavit, and that his tests did not in fact establish the claimed superiority of the Hall resin over that of Bramberry [R. 387-90]. The defendant did not present any evidence to the contrary. Nor did Mr. Crump, who was present at Dr. Dawe's testimony long prior to the trial of this action, ever attempt to rebut Dr. Dawe's testimony attacking the veracity of Crump's file wrapper affidavit and his "stacked" tests.

The contentions regarding the disclosure of Bramberry in the affidavits of both Silversher and Crump were followed by tests which were supposed to compare the *resins* employed by Hall and Bramberry. These tests were designed to show that the alleged thermoplastic resin of Bramberry was inferior in wear to the thermosetting resin of Hall [PX-2-A, pp. 64-65; PX-2-B, pp. 42-46 (Appendix)]. The tests, however, made no such comparison, because the lubricating solid used in connection with the test of the Hall resin was primarily molybdenum disulphide, which was known to be a far better lubricating material than the graphite employed in the comparative test of the Bramberry resin. Therefore, the tests set forth in the affidavits were fundamentally and basically meaningless from a technical point of view and could not possibly establish the superiority of Hall's

resin over that of Bramberry [R. 233-36, 1237-38, 418]. As stated by Mr. Silversher in respect of his own affidavit [R. 395]:

“Q. (By Mr. Kern): Is it possible that a more impartial result from a technical point of view would have been secured from your tests if you had used the same lubricating solid in both resins?

“A. Yes, it would have been.

“Q. In your present opinion, is the affidavit which was submitted to the Patent Office, appearing on pages 63 to 65 technically sound?

“A. No, it was not.”

The failure to test the Bramberry resin in a coating containing graphite as against the Hall resin using *graphite* in the coating was due to the fact that the Hall composition, using graphite as a solid lubricant, would not operate within the minimum requirements specified in the affidavits of Silversher and Crump [R. 388].

In addition, in the tests performed by Mr. Crump, he selected a roofing asphalt for the Bramberry resin, which was obviously the poorest performing example he could have chosen in the field of petroleum residue pitches. He makes no mention of baking this coating whatsoever, despite the fact that Bramberry indicated baking at 400° to 600° F. when a hard coating was desired [PX-2-B, pp. 43-44, appendix]. In the Hall composition he failed to follow the Hall patent disclosure, but employed the best running commercial composition known, which did not include the components which Hall specified, but instead included polyvinyl butyrol and two to five per cent of an elastomeric resin [PX-2-B, p. 45; R. 237-38, 1238-39].

The Crump comparative tests were thus “stacked” tests wherein the Bramberry composition coating and process were predesigned not to work, and the Hall coating went beyond the Hall patent disclosure in order to insure good performance.

(i) Comparative Wear Tests of Hall v. Bramberry.

In order to establish the comparative wear properties and permanence of the Hall and Bramberry lubricating coatings, tests were separately conducted by Dr. Dawe and by J. DeDapper of Redel, Incorporated, a research testing laboratory [R. 409], using the same lubricating solids, molybdenum disulphide or graphite in each of the respective resins compared. Both of the witnesses Dawe and DeDapper described their test conditions and procedures in detail and submitted for inspection their test races on which the coatings were deposited [R. 1239-47; PX-43-B; R. 1759, 418-23; PX-23; R. 1719-25].

Dr. Dawe concluded, as a result of his tests, as follows [R. 1247]:

“A. It appears to me that the Crump tests do not make an adequate comparison of the two binder systems and that the evidence that Crump gives does not substantiate the fact that the Bramberry binder is inadequate and it is thermoplastic.

“Q. (By Mr. Kern): What do your own tests show?

“A. Our tests show that *if you used the same lubricating solid in each of the two systems you get comparable results.*”

Mr. DeDapper reached a like conclusion—namely that, if you compared all graphite coatings of Hall and Bram-

berry, a similar wear life was achieved with either binder system. Likewise, if one employs ninety per cent molybdenum disulphide in lieu of the graphite in the Bramberry system, results are achieved in the neighborhood of fifty or sixty hours of wear life on the Hartman tester, which is consistent with the required times suggested by Mr. Crump in his affidavit as being commercially acceptable [R. 423-26; PX-23, R. 1724].

Defendants made no effort at the trial to establish that the Hall binder system achieved superior results to the binder of Bramberry, which Mr. Crump had alleged was thermoplastic and would therefore not work. *No tests or other evidence was ever offered or ever submitted by defendant comparing the two binder systems using graphite in both the Hall and Bramberry systems as the lubricating solid.*

The tests of DeDapper actually compared all-graphite coatings applied by a licensee under the patent in suit (Electrofilm Coating No. 4006) with an all-graphite Bramberry coating [PX-23, R. 1723; PX-30, R. 1726, 562-63]. Defendant sought to attack this comparison only on the ground that its all-graphite coating No. 4006 was not intended as a lubricating coating and by cross-examination on the procedure used by these witnesses, Dawe and DeDapper [R. 430-62, 1248-1311]. Defendant did not offer any comparative tests itself using the same lubricating solid in both films. The record is therefore silent as to any alleged new or improved results obtained from the use of the thermosetting resin of Hall over the resins disclosed by Bramberry.

Accordingly, the Trial Court made no finding of fact as to any new or improved results accruing from the combination of steps claimed in the Hall patent in suit.

IV.
ARGUMENT.

POINT 1.

Findings of Fact Nos. 9 Through 15 Relating to Prior Knowledge or Use, Prior Public Use and Prior Invention Are Supported by Substantial Evidence and Are Not Erroneous.

(a) Introduction.

The defendant attacks Findings 9 through 15 of the Trial Court basing such attack on the alleged error in admitting five particular exhibits into evidence, contending that the findings would not be supported by the evidence if the evidence claimed to be inadmissible were stricken (Appellant's Opening Brief, p. 28). While it is plaintiff's contention, as will be discussed *infra*, that each exhibit was properly admitted, the prior invention, prior knowledge and use, and prior public use of the process described and claimed in the Hall patent as set out in the findings are each established by clear, strong and convincing evidence even without reliance upon the particular exhibits objected to by defendant.

(b) Finding No. 9.

In this finding the Court held:

"The process disclosed and claimed in the Hall patent in suit was known and used by Acheson Colloids Company and various of the officers and employees of that company, who reduced the said process to practice and participated in such reduction to practice by customers of Acheson Colloids Company long prior to April 13, 1946, in connection with the application, in accordance with the essential steps of the Hall process, of the Acheson products 'Varnodag' and 'dag' dispersions Nos. 35, 38, and 47, said com-

positions each comprising graphite in a thermosetting resin, and Acheson Colloids Company has, since at least as early as 1941, sold various of said compositions with directions to apply them in a manner similar to the method described and claimed in the Hall patent, which has been done by its customers.”

The process disclosed and claimed in the Hall patent in suit was known at Acheson by Mr. Reynolds, Mr. Crankshaw, Mr. Buck, and Dr. Dawe and was successfully tested at Acheson long prior to April 13, 1946. Mr. Buck practiced the process by applying Varnodag, a thermosetting phenolformaldehyde resin containing graphite, and testing the coatings [R. 1187-90]. Mr. Reynolds acquired knowledge of the application of Varnodag in accordance with the process of the patent in suit in 1940 through the tests of his subordinate Mr. Heer [R. 1058-68]. This evidence in itself is sufficient to invalidate the patent in suit under 35 U.S.C. Section 102(a) without reliance on any acts performed by Acheson customers.

The basic Supreme Court case under this section, *Corona Cord Tire Co. v. Dovan Chemical Corp.*, 276 U. S. 358, 72 L. Ed. 610, 48 S. Ct. 380 (1928), clearly establishes that performance tests of this type which were carried out on the Acheson products constitute the requisite reduction to practice of the process. The *Corona* case holds [276 U. S., at 384] that a successful carrying out of the invention in the laboratory is sufficient to establish prior knowledge and use without regard to commercial use.

In the present case, the evidence is much stronger, since Varnodag, as well as Dag 35, 38, and 47, was later placed in production and sold for use in the process [R. 1045, 1152]. This knowledge and use at Acheson is not only established by the uncontradicted testimony of three witnesses, but is also corroborated by documentary evidence,

particularly the Technical Bulletins of 1934 and 1941 [PX-40-B, 40-E], and the Heer memorandum [PX-40-F] discussed below.

The testimony of the Acheson witnesses Reynolds and Crankshaw also clearly establishes their knowledge of the use of the process of the Hall patent by customers of Acheson who applied Dag dispersions 35, 38 and 47 prior to April 13, 1946. These three dispersions were developed by Dr. Dawe in 1941-1942 and were each thermo-setting resins containing graphite. This is established, without controversy, by Dr. Dawe's testimony and laboratory notebook in evidence [PX-43-A, R. 1219-20]. This notebook, plus the oral testimony, corresponds to the evidence held sufficient in the *Corona* case to establish that the patentee was not the first discoverer of the patented invention. See also to the same effect *Rosaire v. Baroid Sales Division, National Lead Co.*, 218 F. 2d 72 (C. A. 5, 1955).

It should be noted that 35 U.S.C., Section 102(a) specifies that prior knowledge *or* use will bar issuance of a valid patent. Here it is established by very clear and convincing evidence that the process was reduced to practice by such customers in their use of the Acheson compositions developed and sold to them by Acheson. Acheson personnel were concerned with the use of their own products and in a technical and consulting capacity aided their customers in using the products and thus performing the process. There is no requirement in the law, as defendant appears to intimate [Brief, p. 28], that the prior knowledge of a process be derived from the personal reduction to practice by the party or parties having such knowledge.

Both Mr. Reynolds and Mr. Crankshaw testified to having observed the performance of the process of the Hall patent in the plants of a number of their customers

using Dag dispersions 35, 38 and 47, and the processes at two plants were described in detail step by step [R. 1090-92, 1134, 1152-64]. This testimony is not hearsay, as alleged in defendant's opening brief [p. 28]; it is testimony by technically trained percipient witnesses of operations which they personally observed. While Mr. Reynolds testified that Aquadag was used at Process Engineering, as indicated in appellant's brief [p. 28], he also testified that Dag dispersions 35, 38 and 47 comprising graphite in thermosetting resins were on other occasions used at Process Engineering [R. 1141-42].

(1) ADMISSIBILITY OF DOCUMENTS SUPPORTING
FINDING No. 9.

The above evidence relative to the knowledge and use of Varnodag is *corroborated* by the report of Mr. Heer [PX-40-F, R. 1741] which sets out the process of application by Acheson to parts supplied by General Electric Appliance Company. The knowledge and use resulting from the application by its customers of Acheson dispersions Dag 35, 38, and 47 is *corroborated* by the group of cards from the Priority File of that company [PX-40-G, R. 1742 *et seq.*] which are summaries from sales reports covering the application of these dispersions. These are two of the five exhibits to which defendant objects.

With respect to the authenticity of the Heer report, Exhibit 40-F, Mr. Reynolds first testified to the discussions with Mr. Heer concerning the problem of the General Electric Company and the approach to its solution to be taken by Acheson. He identified the document in which Mr. Heer reported on this matter to Mr. Reynolds, and also identified Mr. Heer's signature thereto. Mr. Reynolds testified to the regular course of business of Acheson in preparing and retaining these reports. The reports were regularly prepared by salesmen working under Mr. Reynolds; the originals of the reports were

sent to the company files and signed carbon copies were sent to Mr. Reynolds, who retained them in a file in his office for use primarily in preparation of comprehensive sales treatises. This exhibit is a record made as a memorandum of an act in the regular course of business of Acheson and it was the regular course of such business to make such records [R. 1058-68]. The requirements of 28 U.S.C., Section 1732(a) as discussed by this Court in *C. S. Johnson Company v. Stromberg*, 242 F. 2d 793, 798 (1957) are fully met.

As indicated by the Trial Court, and as set out in the statute, all other circumstances of the making of the record go to its *weight* but not its *admissibility*.

The requirements set out in the case of *William Whitman Co. v. Universal Oil Products Co.*, 125 Fed. Supp. 137 (D. C. Del., 1954), relied upon by defendant [Brief, p. 30], are also met in this exhibit. Here we have a witness, the addressee of the report, testifying to the authenticity of the exhibit and, also signatures of the writer for comparison. In the *Whitman* case, the Court specifically stated that "no witness testified to the authenticity of the exhibits" (p. 145) and, therefore, refused to consider the exhibits.

United States v. DuPont, 126 Fed. Supp. 27 (N. D. Ill. E. D., 1954) also relied upon by defendant, [Brief, p. 30] is concerned with the general rule of hearsay declarations relative to testimony of a witness as to what a third person told him as evidence of the facts asserted. This is not pertinent to the present case, wherein Mr. Reynolds is testifying as to his personal knowledge relative to the General Electric problem in his discussions with Mr. Heer, the document being offered as corroboration of such knowledge. *United States v. Smart*, 87 F. 2d 1 (C. C. A. 5, 1936) [Brief, p. 30] is concerned with the general hearsay rule without reference to 28 U.S.C., Section 1732

and is not pertinent to the present action. In *Teter v. Kearby*, 169 F. 2d 808 (C. C. P. A., 1948) [Brief, p. 30], the Court of Customs and Patent Appeals indicated that the appellant's reports relied upon to corroborate appellant's testimony did not in themselves identify the composition of the catalysts used in the runs (p. 816). In contrast, Plaintiff's Exhibit 40-F completely identifies both the materials and the process involved.

The use of Acheson dispersions 35, 38 and 47 in the performance of the Hall process as observed by Mr. Reynolds and Mr. Crankshaw was corroborated by Plaintiff's Exhibit 40-G [R. 1742 *et seq.*] consisting of thirteen cards selected from a file maintained at Acheson. Mr. Reynolds testified that salesmen under his supervision made reports to him covering their activities at the plants of the customers they called upon. These reports were made in the regular course of the business of Acheson and were reviewed upon receipt by Mr. Reynolds. During World War II, Acheson, like many other manufacturers, had problems with material priorities and, therefore, Mr. Reynolds had certain of his employees prepare a card file covering the use of Acheson products by those of its customers whom Acheson felt would be able to supply priority ratings. This card file was prepared and maintained in the regular course of business by personnel under Mr. Reynolds' supervision who abstracted the material on the cards from the aforesaid salesmen's reports [R. 1075-76, 1116-22]. No entries were made in this priority file after the war but the file was retained because it provided a list of customers using Acheson products [R. 1120]. On cross-examination Mr. Reynolds selected card 71 [R. 1746] as one which he had a specific distinct recollection of referring to in the period 1940 to 1946 [R. 1123-1124] and also referred to the file a year or two ago to look up a use of material [R. 1123]. It is clear that these cards are records made as memo-

randa of events in the regular course of the Acheson business, it being the regular course of business to make such records within a reasonable time after the occurrence of the event. The discussion of the law with respect to Exhibit 40-F, *supra*, is equally applicable to Exhibit 40-G, which also was properly admitted.

Defendants also complain that while depositions were being taken at Acheson, counsel for defendant requested of Mr. Sprague, Secretary of Acheson, permission to take his deposition at that time. Mr. Sprague declined, stating, "I am afraid not, unless I have my own counsel" [R. 1320]. No notice of deposition of Mr. Sprague was ever given and no subpoena for his appearance was ever sought by defendant. Certainly this failure of defendant to pursue this matter in the five months elapsing between the Acheson depositions and the trial of this action cannot now be used to attack the authenticity of plaintiff's exhibits. Defendant had ample time to establish any facts it thought helpful to its position. Its failure to further pursue this matter should in itself be indicative of the authenticity of the documents in question.

(c) Finding No. 10.

In this Finding the Court held:

"The process disclosed and claimed in the Hall patent in suit was known and used at Bell Telephone Laboratories, Inc., in New Jersey prior to the earliest date of invention claimed by the patentee, Hall, in connection with the application of dry film lubricating compositions comprising graphite in a thermosetting resin, which compositions were developed by Robert Burns, Wilfred E. Campbell, and others and successfully applied in accordance with the essential steps of the Hall process at Bell Telephone Laboratories, Inc., in 1934-1935."

It is clearly established that Mr. Burns developed, tested and reduced the "Burns process" to practice, and that Dr. Campbell developed, tested and reduced the "Campbell process" to practice and also carried out and tested the Burns process in 1934-1935. These facts are not contradicted and each in itself is sufficient to invalidate the patent in suit for prior knowledge and use under 35 U.S.C., Section 102(a) and the *Corona* case, *supra*.

The Burns process, as exemplified in his application for patent [PX-44-A, R. 1761 *et seq.*], and Bell Telephone Laboratories specification LRM-2064, Issue 1, Baked Lubricating Finish No. 495 Finish [PX-44-B, R. 1788 *et seq.*] and by Burns' own tests thereof [R. 1348-50] includes treating the surface of the element to form a large number of substantially microscopic irregularities, as by scratch brushing, sandpapering, or zinc electroplating, applying to the irregularized surface an abrasive-free coating mixture consisting of liquid and a large number of finely divided solid lubricant particles, such as graphite, with the liquid including an uncured thermosetting polymerizable resin bonding agent, such as black japan, and baking the coating to polymerize and harden the thermosetting resin. This is the process described and claimed in the Hall patent.

Contrary to defendant's argument [Brief, pp. 25, 27], the Burns process included the surface irregularization step [R. 1348, LRM-2064, Issue 1, R. 1788], and in fact the primary distinction urged by defendant in the Burns process over the Hall process was in the resins employed. Defendant contends that Burns did not use a thermosetting resin [Brief, pp. 25, 27, 34]. In this respect, however, the weight of the evidence establishes the fact that black japan contains thermosetting resins and can be hardened by baking to tightly bond the solid lubricant particles in place on the roughened surface.

Even if we assume *arguendo* that black japan, as a matter of strict terminology, is not properly described as a thermosetting resin, it nevertheless admittedly polymerizes to form three-dimensional cross-linkages which impart to the film the properties of thermosetting resins, namely, hardness, infusibility, and insolubility [R. 146-48, 833, 879-82, 1334]. So regardless of definition of a thermosetting resin, the identical chemical phenomenon occurs in the setting of the black japan, and the identical result is achieved, namely, a hard, infusible, insoluble film. Thus, as found by the Court in Finding No. 15, there is no invention in the patent in suit over the Burns process. *Pierce v. Muehleisen*, 226 F. 2d 200 (C. A. 9, 1955).

It will be recalled that in the Campbell process Beckosol was substituted for the black japan of the Burns process, and the composition containing Beckosol was tested by Campbell against the Burns composition and subsequently was specified by Bell Telephone, both for baking at elevated temperatures and setting at room temperature in the Western Electric process. The evidence that Beckosol is a thermosetting resin is not contradicted. Therefore, it is clear that the process disclosed and claimed in the Hall patent was also known and used at Bell Telephone Laboratories by Dr. Campbell and his associates long prior to Hall's alleged invention thereof.

Defendant's primary argument relative to the Campbell knowledge and use appears to be that Campbell's tests were "experimental" and therefore did not constitute a reduction to practice [Brief, p. 32]. This argument is utterly without foundation, since reduction to practice is not negated by virtue of the experimental nature of the tests, and indeed defendant has cited no authority in support of its argument.

On the other hand, it is well established that successful laboratory testing (which by its very nature is experimental) constitutes a reduction to practice, irrespective of commercial use thereafter. See *Corona v. Dozan*, *supra*, and the citations of the Trial Court on this point [R. 68].

(d) Findings Nos. 11 and 12.

In these Findings the Trial Court stated:

11. "The process disclosed and claimed in the Hall patent in suit was in public use in this country more than one year prior to the earliest filing date of the application for the patent in suit."

12. "The process disclosed and claimed in the Hall patent in suit has been in public, open, and continuous use at Western Electric Company, Inc., Chicago, Illinois, from at least as early as 1938, to the present date, in connection with the application of the dry film lubricating compositions developed and tested at Bell Telephone Laboratories, Inc., such compositions being applied during said period to large quantities of telephone parts in accordance with the essential steps of the Hall process, for the purpose of providing a durable dry film lubricant coating on rubbing surfaces thereof."

Both the Burns process and the Campbell process have been in public, open and continuous use at the Western Electric plant in Chicago. The Burns process, identified as Baked Lubricating Finish No. 495, was in use between 1936 and 1943. This is established by the testimony of Dr. Wagner, Mr. Brown, Mr. Thovsen, Plaintiff's Exhibits 44-B, 47-A, 47-J, 47-L (specifications for 495 finish), and Exhibits 46-A through 46-F, 47-I, 47-K (correspondence *re* establishment of specifications). The Campbell process has been in use from 1938 to the present

being identified as Lubricating Finish, Air Dried No. 517, and later as Lubricating Finish, Baked No. 495. This is established by the testimony of Dr. Wagner, Mr. Brown, Dr. Campbell, as well as Plaintiff's Exhibits 45-A, 45-B (specifications) and Exhibits 47-B and 47-C (correspondence).

This testimony was further corroborated by three Western Electric working drawings, Plaintiff's Exhibits 47-D, 47-E, and 47-F [R. 1818, 1820, 1822]. These drawings have previously been analyzed in detail under the Statement of the Case, *supra*, and support the showing that the Burns process and both versions of the Campbell process were in public use prior to the earliest date of invention alleged by Hall.

The three Exhibits 47-D, 47-E and 47-F, which defendant has objected to admitting into evidence, *are prints of original tracings*. The testimony establishes that the tracings are working drawings of the Western Electric Company which are made in the regular course of its business. The prints were made in the company's blueprint room where the tracings are kept, at Dr. Wagner's request, the prints being prepared by Western Electric personnel and forwarded to Dr. Wagner. *The tracings were produced at the depositions for comparison with the prints* and were obtained from the files at Dr. Wagner's request by company personnel under his supervision. Dr. Wagner identified the tracings and prints as being made and used in the regular course of business of the Western Electric Company [R. 1492-1501, 1506-11]. The present situation is exactly that covered by the ruling of this Court in *C. S. Johnson Co. v. Stromberg*, 242 F. 2d 793 (1957). In this recent case, a witness identified drawings taken from his company's files, which drawings were customarily kept therein (p. 796). A witness also identified the structures shown on a num-

ber of the drawings (p. 796). The Court held that it was not necessary “to produce some one working at the business when the documents were made to identify them, and testify that they were then made ‘in the regular course of business’” (p. 799) and held that there was sufficient foundation laid for the admission of the drawings.

(e) Finding No. 13.

This Finding states:

“Said dry film lubrication method in public use at Western Electric Company, Inc., Chicago, Illinois, was practiced in accordance with the specifications issued by Bell Telephone Laboratories, Inc., and by Western Electric Company, Inc., which specifications described the surface preparation, the materials applied, and the subsequent baking, covering the essential steps of the Hall process of the patent in suit.”

The specifications speak for themselves [PX-44-B, 45-A, 45-B, 47-A, 47-J, 47-L, R. 1788, 1793, 1800, 1812, 1828, 1833]. Dr. Wagner and Mr. Brown, both of whom held supervisory positions in the organic finishing department, testified that the Western Electric operations were carried out in accordance with these specifications [R. 1469-77]. Furthermore, Dr. Wagner, Mr. Brown and Dr. Campbell testified to their personal observations of the practice of the process in the Western Electric Plant, and Mr. Thovsen to personally performing the process as set out in the specifications.

Defendant’s argument that Mr. Burns felt that surface preparation was necessary only to clean the surfaces is not relevant, since the evidence clearly establishes that the surfaces actually were irregularized prior to application of the coating material. All of the parts handled in production at Western Electric were either zinc plated

or acid etched by the bright dip process. It was established at the trial by physical demonstrations under a microscope that both these treatments provide microscopic irregularities over the entire surface of the part. Thus the fact that Mr. Burns did not feel that a step in the process performed at Western Electric was necessary, does not derogate from the fact that it was actually included in the method used, as is set forth in the specifications.

(f) Finding No. 14.

Finding No. 14 states:

“Before the invention by the patentee of the process disclosed and claimed in the Hall patent in suit, the said invention was made by Robert Burns of Bell Telephone Laboratories, Inc., who filed application for letters patent therefor on March 26, 1936; said application was rejected on the prior art, but the invention of Robert Burns was never abandoned, suppressed, or concealed, but was thereafter in modified form extensively employed at Western Electric Company, Inc.”

The Burns process anticipates the process disclosed and claimed in the Hall patent in suit. This has been discussed *supra* in connection with Findings 10-13, as well as in the Statement of the Case and will not be repeated here. The evidence that the Burns process was invented by Mr. Burns prior to March 26, 1936 and was never abandoned, suppressed or concealed but was incorporated in the Bell Telephone Laboratory specification LRM-2064, Issue 1, and used openly at Western Electric is not contradicted. Therefore invalidity under 35 U.S.C., Section 102(g) is also established.

The abandonment of an application for patent does not constitute an abandonment of the invention itself,

and the abandoned application is evidence of the prior invention, *i.e.*, conception and reduction to practice, of the process of the application by the applicant. See, *Smith v. Hall*, 301 U. S. 216, 227, 81 L. Ed. 1049, 1057 (1937); *U. S. Blind Stitch Mach. Corp. v. Reliable Mach. Works*, 67 F. 2d 327, 328 (C. C. A. 2, 1933); *United Chromium v. General Motors Corp.*, 85 F. 2d 577, 579 (C. C. A. 2, 1936).

(g) Finding No. 15.

Under Finding 15 [R. 93] the Trial Court characterized the evidence presented in this case relative to prior knowledge and use, prior public use, and prior invention as “clear, strong, convincing, and uncontradicted” and also found that there is no invention in the patent in suit over such prior art. The evidence relative to prior knowledge and use, public use, and invention has been set out in detail in the Statement of the Case and the arguments relating to Findings 9-14, and the finding of lack of invention over this prior art has not been specifically controverted in appellant’s brief [p. 27].

Defendant’s primary contention relative to this evidence appears to be that oral testimony is not sufficient [Brief, p. 31], which is not in accord with contemporary rulings of this Court: *Whiteman v. Mathews*, 216 F. 2d 712, 716 (1954); *C. S. Johnson Company v. Stromberg*, 242 F. 2d 793, 795 (1957). See also: *Borkland v. Peterson*, 244 F. 2d 501, 503 (C. A. 7, 1957).

Accordingly, it is submitted that each of Findings 9 through 15 is proper and should be affirmed.

POINT 2.

The Essence of the Alleged Invention of the Hall Patent in Suit Is Anticipated by Prior Art Patents Which Were Not Cited by the Patent Office.

The prosecution of the Hall patent in suit was long and persistent, involving over nine years in the Patent Office and including five Office interviews and the submission of affidavits on three occasions to distinguish over the prior art. It was conducted as a process of wearing down a series of examiners, or, as stated by the Second Circuit in *Gentzel v. Manning, Maxwell & Moore, Inc.*, 230 F. 2d 341, at 345 (1956):

“ . . . Of at least equal persuasiveness are the tortuous progress of these patents through the Patent Office from 1935 to 1942 and the many emendations of statement, especially in the second patent, made to meet the objections of examiners—a classic example of what Judge Learned Hand has called ‘the ant-like persistency of solicitors’ which overcomes ‘the patience of examiners, and there is apparently always but one outcome.’ ”

Throughout most of this entire prosecution of the Hall applications, defendant contended that the gist of the invention claimed was the use of a thermosetting resin. The prior art was distinguished on the basis of the failure of the prior art patentees to teach the use of a thermosetting resin which would set up to a hard and infusible condition. The argument which finally resulted in the allowance strongly urged that invention resided in the use of a thermosetting resin over the alleged thermoplastic resin of Bramberry and the other prior art cited [PX-2-B, p. 46, Appendix].

During this entire prosecution, none of the patents in this art showing the use of such thermosetting vehicles was cited except the Bramberry patents. Bramberry's

teachings were avoided by means of the Crump and Silversher affidavits which induced the Patent Office to accept an erroneous technical interpretation thereof. Neither the Greth, Wilkey, nor Menking patent showing the application of thermosetting resinous binders containing graphite or molybdenum disulphide was ever cited, and there is no presumption of validity of the Hall patent over this most pertinent art. *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 191 F. 2d 632, at 634 (C. A. 9, 1951).

Defendant, during the trial, admitted that the Greth patent shows this essential step, namely, the application of a thermosetting resin with solid lubricant particles dispersed therein, which is subsequently baked in to set the resin [R. 795-97, DX-W].

Mr. Bush, defendant's chemical expert, specifically adopted Mr. Crump's testimony at the trial on the teachings of this and the other patents cited [R. 831], and there was and is no factual question to be determined respecting the prior art disclosure by Greth of such use of thermosetting resins.

Even though the Greth patent is in the German art (which may account for the Patent Office overlooking same), it alone negatives any invention in the Hall patent, since it anticipates that step which constitutes the alleged advance in the art for which the patent was granted. The essence of the alleged inventive concept of Hall [R. 170-71] is clearly shown in the Greth patent alone.

That a foreign patent teaching the essence of the alleged invention does not also disclose a structure or process identical in each detail to that of the patent in suit does not preclude its anticipation thereof (*Gratiot v. Farr*, 237 F. 2d 940, 942 [C. A. 9, 1956] [Cert. denied 352 U. S. 1026]). The fact that Greth takes for granted the conventional step of surface preparation as shown in

the earlier German art in this field [Becker, R. 1658; Koch, R. 1684; Englisch, R. 1711] and is concerned primarily with the problem of finding the best resin to employ, does not mean that this patent is not anticipatory. It required no inventive talent to apply Greth's selected thermosetting composition upon surfaces which are prepared in the same manner as metal surfaces have been conventionally prepared in the past to obtain adherent coatings.

Thus plaintiff submits that any one of the prior art patents to Wilkey, Menking, or Greth, heretofore discussed, which show the use of thermosetting resins, is sufficient to negative invention, since each of these non-cited patents anticipates the "inventive step" of the method claimed in this case. This is particularly true of the Greth patent because of its clear disclosure and the admitted teaching of this essential step in such prior art patent.

POINT 3.

The Hall Patent in Suit Is Invalid for Lack of Invention Because the Method Claimed Is Merely an Assemblage of Old Steps, Which Produce No New, Surprising, or Unexpected Results.

Each of the steps of the Hall process, namely, surface irregularization, application of a thin coat of a thermosetting resin containing graphite, and baking thereof to set the resin, is old in the prior art as shown by the prior art patents discussed, *supra*. Indeed, defendant has admitted by its chart in evidence [DX-W] that each of the individual steps is shown in one or another of various prior art patents and publications.

Each of the old steps in the Hall patent in suit is effected for the same purpose and has the same result as it did in the prior art. Hall irregularizes the surface to obtain improved adherence. In the prior art the surface

roughening is for the same expressed purpose. See, for example, the Thomson patent discussed *supra* [R. 1616] or the aferomentioned German art.

Hall uses a thermosetting resin as his vehicle and bakes it in to obtain a hard, wear-resistant film. In the prior art, as, for example, in Greth, Wilkey, Menking, and Bramberry, thermosetting resins as vehicles for the lubricating solids are employed for exactly the same reason. Moreover, the thickness of the film in the prior art is governed by the tolerances required, and, as specified in such prior art patents as Thomson, Wilkey, or Bramberry, is under one one thousandth of an inch.

When we combine these steps of the Hall patent, namely, the surface irregularization and application of a thin thermosetting resin coating containing lubricant solids therein, which is baked in, we obtain a film which is asserted to be hard, insoluble, and adherent (more permanent and wear-resistant). These are the particular advantages claimed for the Hall film. They result merely from the simple addition of the known advantages or results achieved by each of the individual steps. Surface irregularization was known to improve adherence. Use of a thermosetting resin was known to result in a harder film. No "additional or different function in the combination" results from the putting together of these steps as is required by the Supreme Court in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147, 152, 95 L. Ed. 162, 167.

There was no factual evidence whatever offered by defendant to attempt to show that any of the steps of the Hall patent accomplish any different results than such steps did separately in the prior art. There was no evidence here that the bringing together of these steps produced any new or surprising consequences. The most that has been contended for by the defendant is that the

Hall patent, as a result of the bringing together of these steps, produced a coating which had good adherence and a relatively long wear life. Since the individual steps in the prior art were each designed to do the same thing in Hall's method which they did in the prior art, we suggest that what Hall did was not enough to sustain the validity of the patent for a mere combination of old steps.

As stated by this Court in *Hunter Douglas Corp. v. Lando Products, Inc.*, 215 F. 2d 372, at 375 (1954), in holding invalid the process claims there in suit.

“The rolling operation in the Hunter invention is to thin the strip. That is true of all rolling operations. The shaver is designed to trim the edges. Likewise, that is true of all shavers. Passing the strips through a number of rolls was known. No new or different function is disclosed.”

To the same effect see the following recent decisions by this Court involving method claims, each step of the method being old in the art: *Photochart v. Photo Patrol, Inc.*, 189 F. 2d 625 (1951); *Oriental Foods v. Chun King Sales*, 244 F. 2d 909 (1957).

The additional details of dependent claims 2 through 7 of the Hall patent add nothing new or inventive to the accumulation of steps. Both graphite and molybdenum disulphide, as specifically enumerated in claims 2 and 3, were used as lubricating solids prior to Hall. The use of molybdenum disulphide in lieu of graphite is shown in the Wilkey patent [R. 1661] and in the N.A.C.A. bulletin [R. 1711] prior to the 1950 application of Hall which first introduced this material into the Hall specification. It is recognized in this prior art as a superior lubricating solid to graphite.

Claims 4 and 5 specifying phosphatizing and sandblasting, respectively, as surface preparations to irregularize

the surface, are both admittedly old steps and have long been used to prepare metal surfaces for coating thereover [R. 168, 885-87, 1849]. While in its brief defendant asserts that other surface preparations are less effective [p. 37], such other methods preparatory to applying the coating, as set forth in the EverLube specifications [DX-B, R. 1851] and the Gilfillan specifications [DX-J, R. 1877], were nevertheless asserted by defendant to result in infringement.

The proportions of resin to solids set out in claim 6 are within the range specified in several prior art patents, as, for example, the Bramberry patents [R. 220, 1689]. And claim 7 covering the product produced by the process of claim 1 does not purport to add anything to the latter claim, by way of details old in the art or otherwise.

There is no evidence that any of these details of claims 2 through 6, each of which is old in the art, contribute anything new or achieve any different results from those obtained in the prior art when these same steps were there employed.

POINT 4.

All of the Steps of the Hall Patent in Suit Are Disclosed in the Bramberry Patents, Which Fully Anticipate the Claimed Method of Hall.

As pointed out under the discussion of the prior art Bramberry patents, each of the steps claimed in assembly by Hall is taught in Bramberry patents Nos. 2,470,136 and 2,534,406.

In these patents Bramberry irregularizes the surface by cross-hatched honing or chrome plating and by phosphate treating. He forms phosphate crystals at the surface of the metal by incorporating the phosphoric acid into his binder, thereby combining a phosphatizing step with the application step [R. 1689, 882].

Bramberry then applies to the prepared surface a binder containing graphite to form a coating which is under one one-thousandth of an inch thick, after baking at 400° to 600° F. to harden the binder [R. 1689].

Bramberry's binder is a resin of the type of petroleum or vegetable residue pitch which defendant argued does not include thermosetting resins. This contention is supported by the testimony of defendant's employee Mr. Crump, who was not a chemical but a mechanical engineer [R. 804]. Mr. Crump, who dismissed other prior art patents as showing no thermosetting resins because no baking step was disclosed, conveniently overlooked the baking of the Bramberry coating in his own discussion and tests of the Bramberry resin as set forth in his affidavit [PX-2-B, Appendix].

Certainly the weight of the evidence strongly supports plaintiff's contention that Bramberry teaches the use of both thermoplastic and thermosetting resins, as demonstrated in tests conducted by Dr. Dawe, Dr. Burnham, and Mr. DeDapper, all highly qualified chemists. Even the patentee applied the term "thermosetting" to Bramberry's pitch, thus showing that, in the sense in which the patentee used the term, the Bramberry disclosures embraced a teaching of both thermosetting and thermoplastic resins [R. 679].

Even if we should assume *arguendo* that Bramberry does not contemplate or clearly disclose thermosetting resins in his binder, there is no invention shown in Hall in the substitution of such thermosetting resins for the thermoplastic resins which Bramberry is asserted by defendant to teach.

The known properties of thermosetting resins are, by very definition, hardness and insolubility. These are the desirable properties asserted for the coating of the Hall patent. The substitution of one material with known

characteristics for another material does not rise to invention. See: *United States Appliance Corp. v. Beauty Shop S. Co.*, 121 F. 2d 149, 150 (C. C. A. 9, 1941) (Cert. denied 314 U. S. 680); *Krueger v. Whitehead*, 153 F. 2d 238, 239 (C. C. A. 9, 1946) (Cert. denied 322 U. S. 774); *Pierce v. Muehleisen*, 226 F. 2d 200, 204 (C. A. 9, 1955). Thus it would not require exercise of the inventive faculties to use a thermosetting resin, known to possess these characteristics of hardness and insolubility, in the known processes, such as taught by Bramberry, for the purpose of obtaining a hard insoluble film. As stated in *Pierce v. Muehleisen*, *supra* (p. 204):

“We do no more than recite a well established rule of law when we say the application of an old process to analogous material of foreseeably similar character is not a sufficient contribution to the science to justify the award of a patent monopoly. It is only the achievement of the inventive faculty, as opposed to the product of the exercise of ordinary professional skill, that entitles the researcher to a patent . . .”

Finally, the evidence failed to establish any new or *improved* result in the Hall process over the application of a lubricating coating under the Bramberry disclosure. The tests of Mr. DeDapper and Dr. Dawe, both thoroughly explained and reported, showed that a substantially similar wear life is achieved with both the Hall and Bramberry coatings where the same lubricating solid is employed in each [PX-23, R. 1719; PX-43-B, R. 1239-48]. Defendant notably failed to test comparatively the two coatings for wear life, using graphite as the lubricating solid in each. Therefore, even the alleged improved results derived from the Hall coating over that of Bramberry is unsupported in the record.

POINT 5.

Finding of Fact No. 17 Is Erroneous.

The Trial Court's Finding of Fact No. 17, holding that the prior art patents do not anticipate the Hall patent in suit and that there is invention thereover, is clearly contrary to the weight of the evidence, as well as the clear showings of the listed patents themselves, which admittedly establish that each step of the Hall patent was old, including the particular step which was alleged to represent the inventive advance in the Hall patent. It is apparent that the Trial Court disregarded the admonition of this Court in reversing the Trial Court's holding of validity of the method patent involved in *Oriental Foods, Inc. v. Chun King Sales*, 244 F. 2d 909 (1957). In that decision this Court, quoting from the decision of the Supreme Court in the *Great Atlantic & Pacific Tea Company* case, *supra* (p. 912) stated:

“ . . . Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly. * * *.”

Moreover, the Trial Court made no finding that the bringing together of the various old steps into the Hall process achieved any new, unusual, or even improved results. In the absence of such a finding, the validity of the Hall patent in suit over these prior art patents cannot, we submit, be sustained. See: *Kwikset Locks, Inc. v. Hillgren*, 210 F. 2d 483 (C. A. 9, 1954); *Bergman v. Aluminum Lock Shingle Corporation of America*, 251 F. 2d 801 (C. A. 9, 1957). As indicated in the last cited case (p. 809), "such a lack" in the findings "makes it impossible" to sustain the judgment of validity over the prior art patents cited.

Conclusion.

The Hall patent in suit is invalid for prior knowledge and use, prior public use, and prior invention under 35 U.S.C. 102(a), (b), and (g), and the Trial Court's findings thereon are amply supported by clear and convincing evidence and are not clearly erroneous. Therefore the Court's judgment of invalidity on these grounds, and each of them, should be affirmed.

The Hall patent in suit is also invalid for anticipation and lack of invention over the prior art patents and publications pleaded, and the judgment of invalidity should be affirmed on these grounds, as well as on the prior knowledge and use, public use, and prior invention found by the Trial Court.

Respectfully submitted,

HARRIS, KIECH, FOSTER & HARRIS,

WARREN L. KERN,

WALTON EUGENE TINSLEY,

Attorneys for Appellees.



APPENDIX.

1. Summary of the History of the Art of Dry Film Lubrication as Provided by Dr. John Burnham [R. 178-182].

“Q. (By Mr. Kern): Now, Dr. Burnham, I believe that you indicated that you made a thorough study of the art of dry film lubrication, engineering, and in the libraries out here, and in the New York library I think you stated. I wonder if before we go into individual patents whether you would give us a brief general history of the art of dry film lubrication?

“A. Well, the art of solid lubricant films is quite old, but I will give a history of the art as I have found it in the patents and technical literature, and try to be brief in that respect.

“This art shows up as a history of the search for a binder of composition materials that can be used to bind solid lubricants on surfaces, that is, on surfaces which are to be used for—which are going to slide in their operation relative to one another, and, therefore, lubrication is required on bearings.

“This art has been affected by the advance in several associated arts, such as the art of solid lubricants, that is, the art itself of different solid lubricants, the art of varnishes and paints and protective coatings for metals, and the art or the treatment of surfaces of these metals in order to improve the adherence of coatings generally on the surfaces.

“The art of solid lubricants, of course, begins with the use of graphite, which is very old, and which has been known for centuries, but at first the graphite was merely sprinkled on the metal surface for the purpose of using it as a lubricant, but it was found unsatisfactory, because as the parts engaged in friction the graphite would slough off the surface.

“The Court: You can still use it on iron hinges, can’t you?”

“The Witness: Yes, sir.

“The Court: All right. And on steel windows. I know, because I have done it down in Palm Springs.

“The Witness: I also do it. However, the art of solid film lubricants really began with the idea that one could take the graphite and bind it on the surface, that is, use a binder to form the film, which is more or less permanent, or which is relatively permanent on the surface, and thus avoid this difficulty.

“Now, this idea first occurred to Hickie in England, who got the basic patent in England in 1895, Patent 11,949, in which he shows, or his invention consists of incorporating plumago with a gum binder, and applying the mixture to the surface of a metal for purposes of lubricating it.

“This represents the first use of a resin, a gum in this case, as a natural resin to bind the graphite to the metal surface for this purpose.

“The second step in this history of the solid film lubricant was the patent to Bergl in Germany in the early 1920’s. Prior to this a composition of phenol formaldehyde and graphite had been made by Baekeland, who invented the phenol formaldehyde resins we are talking about, in which he incorporated the graphite to make a lubricating composition, but he did not apply it in a film form. He merely observed that a bearing could be made which needed no outside lubrication to be added by putting the graphite in this thermosetting uncured resin, and curing it, and forming a solid bearing.

“The next use, however, of a definite solid film as a lubricant came in the invention of Bergl, who showed that one might take all the varnishes and vehicles used in the way of the varnish industry and the paint industry and

protective coatings for metal, and incorporate therein graphite and apply this mixture to a surface and convert it to a solid infusible film, or let us say a solid film which would at least hold the graphite on the surface.

“Next in line, Greth of Germany, also of Germany, recognized, or, let’s say invented and produced a particular type of thermosetting resin binder to prepare such a lubricant film, and he taught in effect that a specific thermosetting resin was useful in applying or binding graphite to the surface of a metal.

“Following Greth we have a development in solid lubricants, or, at least following that time, in which molybdenum sulfide, or moly sulfide, as we called it, was discovered to have superior solid lubricant properties over those of graphite, and Wilkey was the first to use this material, to incorporate this solid film, that is, this solid lubricant molybdenum sulfide with a thermosetting resin to produce an adhering solid film for purposes of lubrication.

“Along with these developments in the solid lubricants, there were developments in the types of synthetic varnishes or synthetic resins which could be used, such as the alkyd resins, which could also be used for the purpose of applying the solid lubricant particles to surfaces, and these were originally, of course, developed for varnishes and protective coatings which were applicable directly in solid lubricant films.

“The last art, which I haven’t discussed, is the development in the treatment of surfaces of metal to improve adherence of coatings and paints, and which also helped, of course, to adhere coatings designed for lubricating purposes, and these include the electrolytic etching of aluminum, for example, the electrolytic oxidation of aluminum, the phosphate coatings on iron and other ferrous metals, to improve the adherence of coatings and to cut down corrosion.

“And then there is one other associated field, in which these resin binders we are talking about were actually used in conjunction with graphite for the purpose of preparing a film which would adhere, but which was not necessarily used for lubricating purposes, but in fact was used as a resistant film, because when you introduce graphite into such a coating, it also changes its electrical conductivity, and this was used in that field.” [R. 178-82.]

2. File Wrapper Affidavit of Ralph E. Crump
[PX-2-B, pp. 38-51].

IN THE UNITED STATES PATENT OFFICE

Div. 25

Applicant: Ralph D. Hall
Ser. No.: 425,751
Filed: April 21, 1954
For: Dry Lubrication Process and Product
State of California, County of Los Angeles—ss.

AFFIDAVIT

RALPH E. CRUMP, being first duly sworn, deposes and says:

I am the Chief Engineer of Electrofilm, Inc., assignee of the above entitled Ralph Hall application. I am a graduate of the University of California at Los Angeles, with the degree of Bachelor of Science. I have been employed as an engineer by Electrofilm, Inc. continuously since 1950, and am thoroughly familiar with the solid film lubricant manufactured by Electrofilm, Inc. and with the above entitled Hall application covering that lubricant.

I was present at two recent personal interviews with the Examiners of said Hall application, at which interviews we discussed in considerable detail the nature, man-

ner of formation, advantages, and extensive commercial success of the Hall solid film lubricant. This affidavit is being filed pursuant to an understanding reached at the second of the interviews, as proof of certain facts which the Primary Examiner considered necessary to a showing of invention, and more particularly to prove facts indicative of both the superiority and unobviousness of the Hall lubricant as compared with the prior art disclosures.

The lubricant covered by said Hall application comprises a thin lubricating film which uniformly coats a bearing surface or the like, and is cured to a solid, dry form on that surface. This film will serve, by itself, as the sole lubricant for many types of moving parts, such as bushings, screws, hinge pins, guides, and the like, and is in most instances a permanent lubricant capable of serving its lubricating function for the entire life of the part treated.

To afford a background for the facts to be evidenced by this affidavit, I will briefly describe the essential characteristics of the process by which the Hall films are formed.

The first step in this process is to roughen the surface of the element to be coated, usually by sand blasting or by a phosphatizing treatment, to produce a large number of small irregularities on the surface. Next, a free flowing coating is applied uniformly to the irregularized surface to form a thin film on the surface. This mixture includes a binder which is at least in part a *thermosetting* resin, with a multitude of minute solid lubricant particles being distributed throughout the binder. After application of the coating substance, the thermosetting binder is cured in place, to tightly bond the film to the irregularized surface, and to permanently retain the lubricant particles in proper positions within the film. For best results, the film thus formed should be very thin, preferably less

than 1/1000th of an inch in thickness. Where films of greater thickness are employed, the upper portion of the film often tends to sheer off or break away from the lower portion, and also the increased film thickness may occupy too much space on parts having a small running clearance.

In a film formed in accordance with this Hall process, the solid lubricant particles give to the film an extremely effective lubricating quality. This lubricating quality is for most practical purposes entirely permanent, lasting usually for the life of the part, largely because the thermosetting resin adheres tenaciously and permanently to both the irregularized surface and the lubricant particles, to permanently retain the particles on the surface. Since the thermosetting resin is permanently cured, it can not subsequently soften or melt in use, and thereby release the lubricant particles, as could a thermoplastic resin.

Solid film lubrication was virtually unknown to the industry until 1946, when Ralph Hall made the invention represented by the above entitled patent application (original Hall filing date April 13, 1946). Since then, solid film lubricants applied in accordance with the Hall process have come into very wide scale commercial use for a variety of lubricating purposes. During the twelve month period from September 1, 1953 to August 31, 1954, Electrofilm, Inc. made direct gross sales of solid film lubrication covered by said Hall application in the amount of \$375,087.00 and an additional approximately \$650,000.00 worth of the lubrication was applied by job shops and manufacturers licensed by Electrofilm. These figures are brought out in a paper attached to this affidavit, titled "Commercial Use of Hall Lubricant Film", and hereby made a part of this affidavit. The same paper also lists by name some of the numerous well known manufacturers who utilize the Hall lubricant film, and gives examples of certain of the parts on which the film is used.

Bramberry Patent No. 2,534,406.

At the recent interviews, Examiners relied heavily on Bramberry Patent No. 2,534,406, issued Dec. 19, 1950 (application filed September 22, 1944) as the closest prior art against the Hall application. I have read this Bramberry patent very carefully, and have carefully considered its disclosure as it bears on the Hall application. From this review, and from actual experiments which have been conducted under my supervision with the Bramberry and Hall films, it is entirely clear to me that the Bramberry film could not possibly serve as a lubricant with enough permanency to be sold commercially for the uses for which the Hall film is intended. This is due largely to the fact that Bramberry employs a thermoplastic resin as a binder, ("petroleum or vegetable residue pitches", see col. 5, line 59) rather than a thermosetting resin. Bramberry specifically states that his resin should have a softening point between 155° and 170° F. (see Col. 5, line 71) and was thus obviously thinking only of thermoplastic resins for binders in his film. Due to the absence of a thermosetting resin in Bramberry, the resulting film is relatively soft and easily destructible, and will melt and release the lubricant particles under elevated operating temperatures. Consequently, the Bramberry film is not in any sense the permanent type of film produced by the Hall process. In fact, it is apparent from the patent itself that Bramberry intended his film for a very temporary use, specifically to serve as a cylinder lubricant in an internal combustion engine during the initial 'run-in' period.

Comparative Tests: Hall v. Bramberry

To compare the performance of films applied according to the Bramberry patent with films applied by the Hall process, I have conducted tests on a modified Mac-Millan wear tester of the type commonly used for this

purpose in the industry. In this device, a standard Timken test cup is rotated under load at 72 r.p.m. with one face of the cup in frictional contact with a steel shoe. By means of weights and a fulcrum, the contact pressure between the shoe and the rotating cup face is built up in increments of 2000 p.s.i. added each minute until a total of 40,000 p.s.i. is applied. This testing process is described more specifically in the attached Technical Bulletin #4002 of Electrofilm, Inc., entitled "Testing Electrofilm Dry Film Lubricant for Wear".

Four Timken test cups were roughened and then coated in accordance with the Bramberry teaching. Two of these cups were first coated with the 'trowelling compound' of Bramberry, and then his 'spraying compound', while the other two were coated with only the 'spraying compound'. Both compounds were formulated strictly in accordance with the examples given in column 5 of the Bramberry patent, as follows:

Trowelling Compound

- a) 20 grams of Dixon Crucible Graphite #200-10.
- b) 40 grams Tricresyl Phosphate—commercial grade (above ingredients were mixed thoroughly with air-driven propeller mixer).

Spraying Compound

- a) Dissolved 77.8 grams of binder (asphalt-Douglas Oil Company of California's Type 1 Asphalt Roofing 156° F.—M.P.) in 77.8 grams commercial Xylol, solvent grade.
- b) Dispersed 177.5 grams Dixon Crucible Graphite #200-10 in 177.5 grams Xylol and added to (a) above.
- c) Added 123.5 grams of concentrated commercial phosphoric acid and 19.7 grams Alrose "Amine—0" to 203 grams of water (tap), and shook well.

- d) Mixed (b) and (c) above, together, and shook one-half hour on standard paint shaker (Red Devil).
- e) Thinned (d) above with Xylol, to spray consistency.
- f) Sprayed onto the four cups to thicknesses of .6 mils, .35 mils, .4 mils and .6 mils respectively.

The two cups coated with both the 'trowelling compound' and the 'spraying compound' ran only *2 hours, 41 minutes* and *5 hours, 5 minutes* respectively, and their films then became completely ineffective as lubricants. The other two cups, on which only the 'spraying compound' was employed, ran *9 hours, 58 minutes* and *2 hours, 34 minutes* respectively, and the films then broke down. All of these times are entirely too short to allow acceptance of the films for the type of commercial use for which the Hall film is intended, the absolute minimum running period for such uses being 20 hours, and a period of at least 60 hours being preferable.

Three additional test cups were then prepared in accordance with the Hall process, as follows:

- a) Surface of cup was irregularized by phosphate bath treatment (Parker Lubrite Treatment).
- b) The irregularized surface was then coated with the following compound:

53.0 pounds *thermosetting phenolic resin*, modified with small percentage of Polyvinyl Butyral (approx. 10% to 30%) and a small percentage of an elastomeric resin (approx. 2% to 5%)—21% solids content in the 53.0 pounds of resin.

20.0 pounds solvent (approx. equal volumes of Dioxane, Ethylene Dichloride, Ethenol, Secondary Butanol, and Methyl Ethyl Ketone).

1.4 pounds Dixon Graphite #200-10.

12.2 pounds Molybdenum Disulphide (climax #2) (above mixture further thinned to spraying consistency by Dioxane).

- c) The coating was then baked for 1 hour, 10 minutes at 375° F., with the ultimate film thicknesses on the three cups being .45 mils, .45 mils, and .40 mils.

These cups, prepared in accordance with the Hall process, were placed in the Mac Millan wear tester, with all conditions the same as when the Bramberry cups were tested. The three Hall cups ran for 131 hours, 117 hours, and 125 hours respectively, before the films showed signs of breaking down, thus indicating the very definite superiority of the Hall films over the Bramberry films.

At the recent interviews, Examiners were shown, and personally examined, the above discussed test cups treated by the Bramberry and Hall processes.

It will be recalled by Examiners that even after having run for 120-130 hours, the Hall films were in much better condition than the Bramberry films, which had become completely useless after 2-10 hours.

The Literature Survey

The primary Examiner has raised a question as to whether the substitution of a thermosetting resin in Bramberry for the thermoplastic resin actually employed would be a change amounting to invention. On this point, it is highly significant that the teachings of the art prior to the original Hall filing date in 1946 were all definitely in the direction of utilizing thermoplastic rather than thermosetting resins in solid film lubricants. In view of the teachings, it would certainly not have occurred to an ordinary person skilled in the art that a thermosetting resin might actually be preferable over a thermoplastic resin in a solid film lubricant, and consequently the use of such a resin by Hall amounted to an inventive advance over Bramberry. Thermoplastic resins were naturally supposed to be better lubricants by reason of their relative softness, deformability, and other char-

acteristics usually associated with lubricants. Thermo-setting resins, on the other hand, are hard and tend to be brittle, and would not be suspected to be capable of serving any useful function in a lubricating film.

Examiner has asked that an affidavit be presented on the above point, presenting authorities which would indicate preference in the art for thermoplastic resins in lubricant films prior to the earliest Hall filing date. Consequently, since the interviews, I have made a careful search of all patents and literature to which I have access on solid film lubricants, including the entire literature file of Electrofilm, Inc. on the subject. This Electrofilm file has been accumulated over a period of several years, and is, I believe, one of the most complete literature files in the country on solid film lubricants.

In this entire field of search, I have found no mention prior to the original 1946 Hall filing date of a solid film lubricant of the present general type, in which there was employed a *thermosetting* resin cured in place on the surface to be lubricated. There were, however, several pre-1946 disclosures (all patents) of solid film lubricants employing *thermoplastic* resins as binders. These early patents using thermoplastic resins are discussed briefly below:

Patent No. 1,581,394, E. G. Dann, April 20, 1926, Application filed January 11, 1918.

This Dann patent discloses a lubricant film consisting of graphite particles contained within a binder. The particular binder referred to by the patentee is "a coal tar product known to the trade as 'mineral black' *which becomes fluid when heated*". Obviously this binder "which becomes fluid when heated" is thermoplastic, rather than thermosetting.

Patent No. 1,583,913, Joseph Brincil, May 11, 1926, Application filed October 16, 1924.

This patent contemplates a lubricant film comprising a mixture of graphite and a binder of shellac, which is a thermoplastic resin.

Patent No. 1,603,086, Percil Charles McKee, October 12, 1926, Application filed May 9, 1925.

This McKee patent incorporates graphite and other materials within a binder which is formed from the unwashed celluloid of scrap picture film. The celluloid and gelatin of the picture film are of course thermoplastic, and cannot permanently bond the graphite particles in place on a bearing surface in the manner of Ralph Hall's thermosetting resin.

Patent No. 1,686,951, Joseph Brincil, October 9, 1928, Application filed September 21, 1926.

This second Brincil patent is similar to the first, discussed above, and mentions only shellac as a particular type of binder which may be employed.

Patent No. 2,335,958, Arthur L. Parker, December 7, 1943, Application filed March 31, 1941.

In the formula given in this patent for a lubricating film, the only binder employed is a "polymerized vinyl resin". Though Parker does refer to a "powdered thermo-set resin" in his formula, this thermo-set resin is obviously utilized only as a filler, and does not adhere in the manner of a binder to either the graphite particles or the surface being treated. This is true because the phrase "thermo-set resin" refers to a resin which has already been cured or set prior to its incorporation into the coating compound. The "thermo-set resin" is therefore not cured in place on the surface of the bearing element or other part being treated, as is necessary in

order to attain the advantage realized from the use of a thermosetting resin in the Hall process. In this connection, attention is directed to the following statement on page 1, column 2, line 5 of Parker "The thermo-set resin is employed in a finely powdered form, produced by grinding the condensed and *set* resin in a ball mill or the like until it is of fine uniform size and angular shape, . . .".

Patent No. 2,470,136, Harry M. Bramberry, May 17, 1949, Application filed September 22, 1944.

This Bramberry patent utilizes as a binder a resin which "may be of the class of petroleum or vegetable residue pitches". Such "pitches" are obviously thermoplastic in character rather than thermosetting as is clearly indicated by the fact that Bramberry refers to the binder as having a softening point between 155° and 170° F.

Patent No. 2,534,406, Harry M. Bramberry, December 19, 1950, Application filed September 22, 1944.

This second Bramberry patent, which has been discussed in some detail above, also utilizes as a preferred binder a resin from the class of petroleum or vegetable residue pitches. This second Bramberry patent also states that the binder preferably has a softening point between 155° and 170° F.

In my literature survey, I was unable to find any articles, books, or other non-patent literature which discussed solid film lubricants prior to the 1946 Hall filing date, regardless of what type of resinous binder might be employed. This lack of early non-patent literature of course bears out my previous statement that prior to the development of the Hall process, there was no substantial commercial use of solid film lubricants (and consequently no discussion in the literature of such lubricants).

The Siebel Reference

Examiner has called our attention to an additional reference, specifically patent number 2,330,635, Siebel, September 28, 1943. I have reviewed that patent carefully, and am able to state unequivocally that the Siebel film could not possibly serve the lubricating function for which the Hall film is intended. Indeed the Siebel film is purposely designed to serve as an abrasive, rather than a lubricant, and for that purpose contains large quantities of abrasive particles, such as a grinding powder (see page 2, column 1, line 57 of Siebel). The matter of choosing a binder for such an abrasive film obviously entails vastly different considerations than the choice of a binder for a lubricant film, and consequently the use of a thermosetting resin in Siebel would not suggest the use of such a resin in Hall's lubricant film.

RALPH E. CRUMP

Ralph E. Crump

Sworn to and subscribed before me this 10th day of November, 1954.

[Seal]

ODETTE B. JOYCE

Notary Public in and for State of
Calif., County of Los Angeles.

My Commission Expires August 31, 1958.

No. 15747
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JESUS ARRELLANO-FLORES,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director of Immigration
and Naturalization Service at Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

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FILED

1957

PAUL G. GREEN (1957)

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No. 15747

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS ARRELLANO-FLORES,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director of Immigration
and Naturalization Service at Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant filed his Complaint for Declaratory Judgment and Judicial Review on or about February 5, 1957.¹ An Answer was filed on March 29, 1957. The action came on for trial on May 6, 1957 before the Honorable William M. Byrne, District Judge, who rendered judgment in favor of appellee on June 14, 1957.

Appellant filed a timely Notice of Appeal on June 27, 1957.

The District Court had jurisdiction of the action under 5 U. S. C. Sec. 1009; 8 U. S. C. Sec. 1329; and 28 U. S. C. Sec. 2201, *et seq.*

This Court has jurisdiction of the appeal under 28 U. S. C. Sec. 1291.

¹No reference can be made to the transcript of record since none has been prepared at the present time.

Statement of the Case.

Although no Specification of Errors has been set forth in the Appellant's Opening Brief,² two points only seem to be raised by appellant. The first is that since no final judgment of conviction has occurred in the State court proceeding, appellant has not been "convicted" within the meaning of 8 U. S. C. Sec. 1251(a)(11). The second is that appellant was denied due process by reason of his attorney being given only 48 hours within which to file an application for suspension of deportation. These points arose in the following manner.

On or about May 10, 1956, appellant was served with an Order to Show Cause before a Special Inquiry Officer of the Immigration and Naturalization Service why he should not be deported pursuant to 8 U. S. C. Sec. 1251(a)(11), in that he had been convicted on March 9, 1956 of a violation of law governing and regulating the sale of marihuana. A deportation hearing was held on May 18, 1956 and June 5, 1956 pursuant to the Order to Show Cause. On June 15, 1956, the Special Inquiry Officer determined that appellant was subject to deportation. The Officer also denied the discretionary relief of suspension of deportation under 8 U. S. C. Sec. 1254(a), finding that appellant was ineligible therefor, since he could not establish the necessary requirement of seven years continuous residence within the United States immediately preceding the application for suspension.

²Thus this Court need not consider the points raised on appeal. (*Lee v. United States*, 238 F. 2d 341, 344 (C. A. 9, 1956) (and see cases cited at footnote 15 therein).)

An administrative appeal was taken from the decision of the Special Inquiry Officer and on September 14, 1956, the Board of Immigration Appeals affirmed the lower decision by dismissing the appeal. Accordingly, a Warrant of Deportation was issued by the District Director on September 20, 1956.

ARGUMENT.

I.

Appellant Was Convicted Within the Meaning of Section 1251(a)(11).

There is no dispute as to the facts. Appellant was found guilty on March 9, 1956 of having violated California Health and Safety Code Section 11500 in that on September 17, 1955 he unlawfully sold marihuana. Appellant does not question that a conviction of Section 11500 would constitute a conviction within the meaning of 8 U. S. C. Sec. 1251(a)(11). What appellant contends is that no conviction under the State charge occurred.

The basis for appellant's argument lies in the peculiar California system of sentencing. After the guilty finding of March 9, 1956, the Superior Court judge imposed the following sentence: proceedings were suspended and probation was granted for five years upon the condition, *inter alia*, that appellant serve one year in the County Jail. Under California law, where imposition of sentence upon a defendant has been suspended, no final judgment exists upon which an appeal may be predicated.

People v. Guerro, 22 Cal. 2d 183, 137 P. 2d 21 (1943);

In re Marquez, 3 Cal. 2d 625, 627, 45 P. 2d 342 (1935).

Nevertheless, California law considers that such a defendant has been "convicted".

In re Marques, supra;

In re Phillips, 17 Cal. 2d 55, 109 P. 2d 344 (1941);

People v. Christman, 41 Cal. App. 2d 158, 160, 106 P. 2d 32 (1940).

Thus in California, a defendant is "convicted" upon his plea of guilty or finding of guilt, it being immaterial whether a judgment of conviction is final.

People v. Ward, 134 Cal. 301, 307-308, 66 Pac. 372 (1901);

Ex parte Brown, 68 Cal. 176, 8 Pac. 829 (1885);

In re Morehead, 107 Cal. App. 2d 346, 350, 237 P. 2d 335 (1951);

See *People v. Acosta*, 115 Cal. App. 103, 107, 1 P. 2d 43 (1931);

Cf. People v. Dail, 22 Cal. 2d 642, 652, 140 P. 2d 828 (1943);

Cal. Pen. Code, Sec. 689.

Appellant cites *United States ex rel. Freislinger v. Smith*, 41 F. 2d 707 (7th Cir. 1930), as authority for the proposition that "one is not convicted of a crime unless there is a valid and final 'judgment of conviction.'" The *Freislinger* opinion stated that the issue was whether the appellant therein had been "convicted". In determining that issue, it was held that the law of the place where the alleged conviction occurred would control. Under the law of the State in question, Illinois, a final judgment of conviction was necessary in order that a conviction occur. Therefore the Court held that since

no final judgment of conviction had occurred, the appellant therein had not been “convicted” as defined by Illinois law, and thus not convicted within the meaning of the immigration laws.

Illinois law does not control here. If it is true that the law of the place of the alleged conviction controls, as *Freislinger* holds, then it is clear that appellant was “convicted” within the meaning of Section 1251(a)(11), as he is considered convicted under California law.

In order to exhaust all possibilities, we shall consider what the result would be if federal law controls the meaning of the word conviction. An examination of the law reveals that federal courts long have considered a defendant convicted upon a finding of guilt, even though the judgment is not final.

Berman v. United States, 302 U. S. 211, 212-213 (1937);

Bridges v. United States, 199 F. 2d 845 (C. A. 9, 1953).

In *United States v. Watkins*, 6 Fed. 152, 158 (Cir. Ct. Ore. 1881), it was stated:

“In the argument for the defendant it has been assumed that ‘conviction’ of a crime includes and is the result of the judgment or sentence of the court imposing the punishment prescribed therefor. But this is altogether a mistake. The term conviction, as its composition (*convincio*, *convictio*) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are, (1) by the plea of guilty, and (2) by the verdict of a jury.

* * * * *

“Bishop, Statutory Crimes, §348, says:

‘The word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is not that sentence has been pronounced, but only that the verdict has been returned. So a plea of guilty by the defendant constitutes a conviction of him.’ ”

In *United States v. Gilbert*, 2 Sum. 19, 40, Mr. Justice Story stated:

“And here, in order to avoid ambiguity, it may be proper to state that conviction does not mean the judgment passed upon the verdict; but if the jury find him (the party) guilty, he is then said to be convicted of the crime whereof he stands indicted.”

In *Kerchoval v. United States*, 274 U. S. 220, 223 (1927), the Supreme Court stated:

“A plea of guilty . . . is itself a conviction. . . . More is not required; the Court has nothing to do but give judgment and sentence.”

In *United States v. Hudson*, 65 Fed. 68, 75 (D. C. Ark., 1894), the following language appears:

“Conviction means after verdict of the jury.”

Thus it would appear very clear that whether California or federal law applies to the construction of the term “conviction” in Section 1251(a)(11), the appellant has been convicted. It should be noted that the statute itself does not use the term “final judgment of conviction” but only the well-accepted common law term which, by

statutory construction, must be taken to have its common law significance.

Barber v. Gonzales, 347 U. S. 637, 641 (1954).

The intention of Congress is doubly made clear when we consider that the predecessor statute to Section 1251 (a)(11), 8 U. S. C. Sec. 156a, enacted on February 18, 1931, contained the requirement that an alien be “convicted *and sentenced*.” The elimination of the italicized words by the June 28, 1940, as well as in the 1952 Immigration and Nationality Act, shows that sentence or a final judgment of conviction is not required by the Section in narcotic violation cases. In such cases, “conviction alone is sufficient to warrant deportation.”

Ex parte Eng., 77 Fed. Supp. 74, 79 (D. C. Cal., 1948);

United States v. Watkins, 73 Fed. Supp. 399, 400-401 (D. C. N. Y., 1947).

Appellant has attached as an appendix to his brief an opinion of the Board of Immigration Appeals. What weight, if any, such opinion might have with this Court would seem to vanish when we consider that this same Board determined in the instant case that appellant is deportable. In other words, if this Court followed Board decisions, then necessarily it would be required to follow the instant Board decision with respect to the appellant.

II.

**Limiting Time for Applying for Administrative Relief
Was Not Error.**

The second point raised by appellant is that it was a denial of due process to require his attorney to file an application for suspension of deportation within 48 hours. Whether or not the time allowed by the Special Inquiry Officer was insufficient is a point which we will not argue. The officer's time limitation was made

“in view of the fact that the record establishes that the respondent is statutorily ineligible for the relief requested of suspension of deportation under 244(a) of the Immigration and Nationality Act.

* * * * *

“The record clearly establishes that the respondent has not been physically present in the United States for a continuous period of not less than seven years immediately preceding the date hereof, and that, thereof [sic] any application for suspension of deportation must necessarily be denied.” (Deportation Hearing of June 5, 1956.)

Not only would appellant not have been eligible for the relief requested by reason of his inability to establish the residence requirement of Section 1254(a), but also by his inability to establish good moral character, as is also required. No matter under which paragraph of 8 U. S. C. Sec. 1254(a) appellant sought relief, he was required to prove “good moral character”.

Under 8 U. S. C. Sec. 1101(f)(7), the Immigration Service is precluded from finding good moral character of one who, during the period for which good moral character is required, has been confined to a penal institution for more than 180 days as a result of a conviction. The

service of one year in the County Jail by appellant would bar him from possessing the requisite good moral character.

Thus for two reasons, the desired application for suspension of deportation by appellant must have been denied. This the Special Inquiry Officer knew, and for that reason, he made the time limitation of which appellant complains. In view of such circumstances, the limitation was proper in order to prevent a frivolous delay of the proceeding. Even if the action were improper, no prejudice resulted to appellant because his application could not have been granted.

Conclusion.

No error appearing in the administrative hearing, the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 15762 ✓

IN THE

See Vol. 3058

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELWARD BAKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

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No. 15762
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ELWARD BAKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California, which adjudged the appellant to be guilty of a certain count of an indictment (see Statement of Case, below), which indictment was brought under the provisions of Section 2421 of Title 18, United States Code. [R. pp. 373-374.]

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California. [R. p. 65.]

The jurisdiction of the District Court is based upon Section 3231, of Title 18, United States Code. This

court has jurisdiction to entertain this appeal and to review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

STATEMENT OF THE CASE.

An indictment in one count was filed on July 3, 1957, charging the appellant essentially as follows:

On or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Phoenix, Arizona, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes.

This indictment was superseded by a new indictment in two counts filed on July 24, 1957, charging the appellant essentially as follows:

Count I, on or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Phoenix, Arizona, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes;

Count II, on or about April 1, 1957, the appellant knowingly transported a woman, Sally Sisneros, in interstate commerce, from Las Vegas, Nevada, to Los Angeles County, California, for prostitution, debauchery and other immoral purposes.

The defendant below pleaded not guilty to the first indictment [R. p. 9], and not guilty to both counts of the superseding indictment [R. p. 26]. On the 22nd of July, when it was learned that the government was preparing a superseding indictment, counsel for the defendant

moved for a continuance of the trial date in order to prepare against the new indictment. [R. p. 20.] Said motion was granted and the trial date continued to August 13, 1957. [R. p. 21.] On July 8, 1957, prior to the first arraignment, Mr. Benton was appointed as counsel for the defendant below. [R. p. 4.]

On July 22, 1957, Mr. Benton made a motion to be relieved as counsel, which motion was granted. [R. pp. 15-16.]

On July 29, 1957, Mr. Philip S. Schutz appeared as counsel for the defendant below. [R. p. 25.]

On August 13, 1957, Mr. Schutz asked to be relieved as counsel. [R. pp. 29-33.]

On August 15, 1957, Mr. Schutz appeared as counsel and participated in the selection of the jury. [R. pp. 62-84.]

On August 16, 1957, Mr. Benton again appeared and represented the appellant throughout the remainder of trial. [R. p. 89.] Prior to the commencement of the trial, Mr. Benton made a motion for a continuance inasmuch as he felt inadequately prepared. [R. p. 89.] This motion was denied. [R. pp. 89-94.]

Trial commenced on August 16, 1957 [R. p. 94] and resulted in a verdict of not guilty as to count one and guilty as to count two against the appellant. [R. p. 384.] Appellant had moved for a judgment of acquittal at the close of the Government's case [R. p. 324], and renewed it [R. pp. 325-326, 392], which was denied.

Judgment was entered on September 9, 1957. [R. p. 397.] Notice of appeal was filed on September 16, 1957.

III.

STATEMENT OF THE FACTS.

The record shows that while the appellant was in Phoenix, Arizona, he was, by his own admission, a hustler of girls [R. pp. 222-224] and a narcotics pusher. [R. pp. 108-109.]

The appellant met the victim at a holiday party in December of 1956. [R. p. 102.] The victim commenced living with the appellant thereafter. [R. p. 104.] The appellant induced the victim to become a prostitute for him. [R. pp. 104-116, 170-171.] The victim worked as a prostitute in the Mexican labor camps around Phoenix [R. pp. 106-115] and on the streets. [R. pp. 118-119.] While the victim was working as a prostitute she gave her earnings to the appellant. [R. pp. 112, 119, 123, 127, 247.]

The appellant took the victim from Phoenix to Las Vegas in February 1957 so that she could work in the latter city as a prostitute. [R. p. 120.]

The appellant and the victim returned to Phoenix separately but the victim again commenced working for the appellant as a prostitute. [R. p. 127.]

The appellant told the victim that they were going to leave Phoenix and go to Los Angeles and that she would work as a prostitute in Los Angeles. [R. pp. 127-128, 133.]

On March 30, 1957 they left Phoenix [R. pp. 231-232] and traveled to Las Vegas. [R. p. 129.] While they were in Las Vegas the second time, the victim worked as a prostitute. [R. p. 132.] They stayed in Las Vegas for four or five days. [R. p. 246.]

The appellant again stated that he was going to take the victim to Los Angeles and have her work as a prostitute there. [R. p. 133.] The appellant then took the victim from Las Vegas to Los Angeles. [R. p. 133.] He introduced her to some other girls upon arriving in Los Angeles [R. p. 134], one of whom was thought to be a prostitute. [R. p. 136.] The appellant and the victim lived together for several days at the Hayes Motel [R. p. 137] and the victim had sexual intercourse with the appellant and with a sailor who had been procured by the appellant and another man. [R. pp. 136-143.] This other man, known as Smitty, had been introduced to the victim by the appellant. [R. pp. 137-138.] He was supposed to show the victim places to work out of and actually did show the victim such places. [R. p. 138.] The appellant introduced the victim to another girl, Barbara Garcia, a prostitute, who was going to show the victim the streets. [R. pp. 144-146.] The victim was reluctant to work as a prostitute and did not push herself in the trade. [R. pp. 143-144.]

IV. ARGUMENT.

The appellant contends in his opening brief and in his statement of points in the transcript of the record the issues to be:

A. Sufficiency of the Evidence.

That the Government failed to establish the elements of the crime of which the appellant was convicted.

However, it is submitted that the elements of the alleged crime were established and that the verdict of

the jury as to count two of the indictment was a proper one.

The indictment was in two counts. Count one charged the defendant with transportation of a woman in interstate commerce for purposes of prostitution, debauchery or other immoral purposes in that he took the victim Sally Sisneros from Phoenix, Arizona, to Los Angeles County, California. Count two alleged the transportation of the victim from Las Vegas, Nevada to Los Angeles County, California for the same purposes on or about the same date April 1, 1957 [Tr. p. 393, lines 2-17.] The appellant was acquitted on count one but was convicted on count two. Therefore, as to this point, we are not here concerned with whether or not the elements of count one were established but only as to the elements of count two since that is the count upon which the appellant was convicted.

Unrebutted testimony clearly shows that the appellant was in Las Vegas, Nevada with the victim and had in his possession a particular type automobile [Tr. pp. 130-133; p. 244, lines 11-18; p. 246, lines 20-24]; that he was seen in Los Angeles County, California a few days later [Tr. p. 257, lines 3-25; p. 258, lines 1-5]; with the same automobile [Tr. pp. 267, 275, 279]; that he was the one who had actually transported the victim across the Nevada-California border [Tr. p. 133, lines 14-25; p. 134, lines 1-11]; that he had induced the victim to become a prostitute for him in Phoenix, Arizona [Tr. pp. 104-116; p. 170, lines 9-25; p. 171, lines 1-4]; that she had worked for him as a prostitute giving the monies acquired from her trade to the appellant [Tr. p. 119, lines 2-15; p. 112, lines 2-21; p. 123, lines 2-8; p. 127, lines 8-13; p. 247, lines 1-24]; that he intended to take

the victim to Los Angeles, California [Tr. p. 127, lines 14-25; p. 128, lines 1-4; p. 133, lines 1-20]; that he intended her to work as a prostitute after their arrival in Los Angeles [Tr. p. 128, lines 5-19; p. 133, lines 1-20]; that he in fact had her work as a prostitute after their arrival in Los Angeles. [Tr. starting p. 134, line 18, to p. 144, line 19; pp. 258-260.] Such evidence is sufficient upon which a jury could base a conviction for violation of 18 U. S. C. 2421.

B.

Evidence Based on Illegal Act.

That the evidence was based upon an illegal act of the Phoenix and Arizona law enforcement agencies by floating the appellant out of Phoenix and out of Arizona and that he was compelled by said officers to take with him the victim.

The Government contends that the appellant took the victim with him when he left Phoenix, Arizona of his own free will and choice and that this had been his intention prior to the date of actual leaving. At no place in the testimony of the officers, either direct or on cross-examination did they state that they ordered the appellant to leave town or the state of Arizona. The only testimony to the effect that the appellant was asked to leave town was from the victim who stated that the appellant had told her that he was told to leave the city and the state, which is only hearsay. [Tr. p. 202, lines 10-18.] The victim testified before the officers testified. Counsel for the defendant was at least aware at this stage of the trial that the defendant-appellant may have been ordered to leave the city and state. If there was real merit in

his contention, why didn't he pursue the matter further on cross-examination of the officers?

Assuming for the sake of argument that the appellant had been asked to leave town, he still had a perfect right to remain. There is prior testimony to the effect that the appellant told the victim that they were going to leave Phoenix and go to Los Angeles and that he was going to have her work as a prostitute at the latter city. This shows that he had the independent intention to go somewhere else to continue in his hustling activities.

The gist of the crime is the transportation of a woman. It is submitted that the woman who was the victim, was not forced to leave, nor was the appellant forced to take her across a state line. [Tr. p. 203, lines 9-12; p. 216, lines 11-17.] The victim testified that she wanted to go with the appellant; that she had not been forced to leave the city or state. The officers testified that when one of them went to the victim's apartment on the night that she and the appellant left town, that she had the clothes and belongings of each packed together in suitcases and was herself ready to leave town with the appellant. [Tr. p. 232, lines 5-25; p. 233, lines 1-23.] The officers testified that they had been told by the appellant on the day of his leaving Phoenix, that he was leaving town. [Tr. p. 231, lines 2-25.] Even though an officer at this point decided to see that the appellant was sincere about leaving by escorting him out of town, it seems obvious that the appellant intended to take the victim with him, else why would the victim have been in her apartment sitting on luggage which contained both the belongings of the victim and the appellant. Regardless of the actions of the officers, the appellant may have had

an independent intention to take the victim with him. The evidence was such that the jury could have so found.

There is no merit to the contention that force was the reason why the appellant took the victim from Las Vegas to Los Angeles. Assuming for the sake of argument that he was forced to leave Arizona, once beyond the borders of that State, there was no compulsion to go further. He was convicted of transporting a woman from Las Vegas to Los Angeles and he was in no way forced by any law enforcement agency to make that trip.

C.

Error of Trial Court—Denial of Continuance.

That the trial court erred in denying the defendant's motion for a continuance after Mr. Benton had been substituted as counsel for Mr. Schutz. It is the contention of the appellant that such a ruling constituted a denial of the appellant's right and that the appellant, with counsel, was not able to adequately prepare his defense for trial, to be represented by counsel. However, the facts do not support such a contention. (See Statement of the Case.) Mr. Benton was originally appointed as counsel for the defendant-appellant from the Federal Indigent Panel on July 8, 1957 at which time the defendant-appellant was arraigned and made his plea. On July 9, 1957 appellant's motion to reduce bail was granted. The trial was then set for July 29, 1957. On July 22, 1957, Mr. Benton made a motion to be relieved as counsel since he felt the defendant was not an indigent. This motion was granted. At this time, Mr. Benton showed that he had a good understanding of the case and indicated that the defendant was preparing a substantial defense. He further indicated that the defendant had retained other counsel, Mr.

Schutz. The defendant was arraigned on a superseding indictment on the 29th day of July at which time Mr. Schutz appeared and the two indictments were set for trial on August 13, 1957. Both indictments arose out of the same fact situation.

On August 13, 1957, Mr. Schutz asked to be relieved as counsel. At this time, the defendant stated in court that he did not wish Mr. Schutz to represent him. The court then told the defendant to obtain counsel and that the matter would be continued until August 15, 1957. Mr. Schutz was present on the 15th and represented the defendant in the selection of the jury. The defendant at this time made the representation that he would like to have Mr. Benton represent him as counsel and that he had talked to Mr. Benton about this but had not actually retained him. The defendant was instructed to contact Mr. Benton and have him as counsel in the further proceedings of the trial which were continued until August 16, 1957.

On August 16, 1957, Mr. Benton's motion for a continuance was denied on the grounds that he had represented the defendant from July 8, 1957 to July 22, 1957 and should have been aware of the facts of the case sufficiently enough to make adequate representations. [R. pp. 89-94.]

The entire transcript will show that the defendant-appellant was well represented by counsel at all stages of the proceedings. He had ample opportunity to hire counsel of his own choosing prior to the date of trial and even after the original trial date, the matter was extended to give the defendant more time to prepare adequately for trial. That he did not act in good faith in

procuring counsel is shown by the record. The fact that he had ample opportunity to employ counsel is sufficient. [See Court's Statement, R. p. 397.]

A leading case which is very similar to the present fact situation is *Neufield v. United States*, 1941, 118 F. 2d 375, 73 App. D. C. 174, *cert. den.*, 315 U. S. 798, 62 S. Ct. 580, 86 L. Ed. 1199. Among other things, it holds the following: The granting or refusal of a continuance is a matter of discretion of the judge to whom application is made; Such a ruling will not be reversed except for abuse of discretion; The fact standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to "assistance of counsel"; A party seeking a continuance must make a showing that a continuance is reasonably necessary for a just determination of the cause; and if a continuance is sought for purpose of securing attendance of witnesses, it must be shown who they are, what their testimony would be, that it would be relevant and competent, that witnesses can probably be obtained if continuance is granted, and that due diligence has been used to obtain attendance at the trial as set; An accused aware of his right to counsel and able to obtain counsel himself cannot over an extended time omit to take any steps towards retaining counsel for trial proper and cannot properly complain if trial court, on morning when case was called for trial, appoints counsel who had been previously retained for reduction of bond. See also: *Avery v. Alabama*, 1940, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Isaacs v. United States*, 1895, 159 U. S. 487, 16 S. Ct. 51, 40 L. Ed. 229; *Tomlinson v. United States*, 1937, 68 App. D. C. 106, 93 F. 2d 652, *cert. den.*, 1938, 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1107.

D.

Contradictory Counts.

That the two indictments (counts) are contradictory and mutually exclusive, thereby making it impossible to defend to both indictments (counts) at the same time.

It is submitted that the test for determining whether or not a pleading is proper is based upon common law principles and which are set forth in the Sixth Amendment to the Constitution: the defendant shall be informed of the nature and cause of the accusation. The courts have established two principles by which these questions may be decided: one, is the pleading certain enough so that the defendant may plead jeopardy if a subsequent indictment is filed; two, is the pleading certain enough to enable the defendant to prepare his defense. *Rosen v. United States*, 161 U. S. 30, 16 S. Ct. 434, 480, 40 L. Ed. 606; *United States v. Aviles*, D. C. Cal. 1915, 222 F. 474; *United States v. Allied Chemical and Dye Corp.*, D. C. N. Y. 1941, 42 F. Supp. 425; *White v. United States*, C. C. A. Okla. 1933, 67 F. 2d 71; *United States v. Potter*, C. C. Mass. 1892, 56 F. 83, reversed on other grounds 155 U. S. 438, 15 S. Ct. 144.

To satisfy this test, each count must be examined by itself to see if it is certain enough to meet the above requirements. Each count of the indictment stated with specificity the charge and the facts leading to the charge so that the defendant was apprised of the nature of the accusation. The dates, places, persons and acts involved were all set forth so that the defendant could not be placed in jeopardy by a subsequent indictment, and were certain enough to permit the defendant to prepare his defense. Both counts arose out of closely connected acts,

or facts which showed acts within a limited time and space. Even though count two alleged facts contained within count one, each count within itself meets the above requirements of certainty.

The court properly instructed the jury that the defendant may not be convicted of both counts but only upon one or the other or neither. [Rep. Tr. p. 373, lines 18-24.]

Conclusion.

We submit that the trial court committed no error in that the evidence was sufficient to find a violation of the law as charged; that no illegal evidence was admitted which affected the rights of the appellant; that the denial of the motion for continuance by counsel on August 16, 1957 was proper and did not violate the appellant's right to assistance of counsel; that the indictment was definite and certain as to each separate count thereby enabling the appellant to be apprised of the charge and that it was stated with certainty and definiteness so that no danger of a second indictment could be urged on the same alleged facts.

Respectfully submitted,

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No. 15763

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DIAMOND KIMM,

Plaintiff,

vs.

BRUCE G. BARBER, etc., *et al.*,

Appellee.

BRIEF FOR APPELLEE.

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JUN 25 1958

PAUL P. O'BRIEN, CLERK

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No. 15763

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DIAMOND KIMM,

Plaintiff,

vs.

BRUCE G. BARBER, etc., *et al.*,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the declaratory judgment action for judicial review of a final order of deportation, pursuant to the provisions of Title 28, United States Code, Section 2201, the Declaratory Judgment Act, and Title 5, United States Code, Section 1009, the Administrative Procedures Act.

This Court has jurisdiction of this appeal from the Findings, Conclusions and Judgment of the District Court [R. 36-41] affirming the validity of the deportation order and the determination that plaintiff was ineligible for the discretionary relief of suspension of deportation, and dismissing defendants, Bruce G. Barber and David M. Carnahan, as improper and unnecessary parties defendant in the action [R. 41], pursuant to the provisions of Title 28, United States Code, Section 1291, said judgment being a

final decision. Richard C. Hoy, District Director of the Immigration and Naturalization Service at Los Angeles, has been substituted as defendant in the place and stead of Albert Del Guercio, retired, pursuant to the order of this Court signed and entered on the 10th day of April, 1958.

Statutes and Regulations Involved.

The Warrant of Arrest issued December 13, 1941, charges that under the Act of 1924 the appellant is deportable as being unlawfully in the United States because he failed to maintain the exempt status of student on which he was admitted to the United States on July 6, 1928, under Section 4(e) of the Immigration Act of 1924.

Section 4(e) of the Immigration and Nationality Act of 1924 (8 U. S. C. 1940 Ed. 204(e)) reads as follows:

§204. *Nonquota immigrant defined.*

When used in this chapter the term “nonquota immigrant” means—

* * *

(e) An immigrant who is a bona fide student at least fifteen years of age and who seeks to enter the United States *solely for the purpose of study* at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Attorney General, which shall have agreed to report to the Attorney General the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn; (emphasis added).

Sections 14 and 15 of the Act of 1924 (8 U. S. C. 1940 Ed. §§214, 215) read as follows:

§214. *Deportation; procedure; * * **

Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this chapter to enter the United States, *or to have remained therein for a longer time than permitted under this chapter or regulations made thereunder*, shall be taken into custody and deported in the same manner as provided for in sections 155 and 156 of this title. . . . [Emphasis added]

§215. *Admission of persons excepted from definition of immigrant and nonquota immigrants; maintenance of exempt status.*

The admission to the United States of an alien excepted from the class of immigrants by clause (1), (2), (3), (4), (5), or (6) of section 203 of this title, *or declared to be a nonquota immigrant by subdivision (e) of section 204 of this title*, shall be for such time and under such conditions as may be by regulations prescribed (including when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 203 of this title and subdivision (e) of section 204 of this title, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) *to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States: Provided,* That no alien who has been, or who may hereafter be, admitted into the United States under clause (1) of section 203 of this title, as an official of a foreign government, or as a member of the family of such official, shall be required to depart from the United

States without the approval of the Secretary of State. May 26, 1924, c. 190, §15, 43 Stat. 162; July 1, 1932, c. 363, 47 Stat. 524; July 1, 1940, c. 502, §2, 54 Stat. 711. [Emphasis added]

Section 19(a) of the Act of 1917 (8 U. S. C. 155(a), 1940 Ed.) reads in pertinent part as follows:

§155. *Deportation of undesirable aliens generally.*

(a) . . . any alien who shall have entered into violation of this chapter, or in violation of any other law of the United States . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . .

This section, as amended December 8, 1942, reads in pertinent part as follows:

§155 *Deportation of undesirable aliens generally.*

(a) Any alien who shall have entered or who shall be found in the United States in violation of the chapter, or in violation of any other law of the United States . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . .

Section 19(c) and (d) of the Act of 1917, as amended in 1948 (8 U. S. C. 1940 Ed. 1950 Supp. 155(c) and (d)) reads as follows:

§155. *Deportation of undesirable aliens generally.*

(c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any

country of his choice at his own expense, in lieu of deportation; or (2) *suspend deportation* of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, *if he finds* (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) *that such alien has resided continuously in the United States for seven years or more* and is residing in the United States upon the effective date of this Act. . . .

(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) section 137 of this title. . . .”

Section 23 of the Internal Security Act of 1950 (64 Stat. 987, 1010) (Sept. 23, 1950) amends Section 20 of the Immigration Act of 1917 (8 U. S. C. 156, 1940 Ed. 1951 Supp.) and reads in part as follows:

§156(a). *Control over and facilitation of deportation.*

. . . No alien shall be deported under any provisions of this Act to any country in which *the Attorney General shall find* that such alien would be subjected to physical persecution. . . . [Emphasis added]

The regulations applicable at the time of the enactment of the Internal Security Act make it clear that the Immigration hearing officers had no authority to make the determination under Section 23 (*supra*) and that it was the enforcement division, *i. e.*, “officers in charge of district offices” and the Assistant Commissioner or Commissioner who were required to make the determination as to which country a deportable alien should be sent.

Section 151.5(a) of Title 8, Code of Federal Regulations (1949 Ed. 1951 Supp.) (15 Fed. Reg. 7638), as amended November 8, 1950, reads as follows:

§151.5 *Decision—(a). Preparation by hearing officer of written decision.*

Except as provided in paragraph (d) of this section, the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law *as to deportability*. If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, *as to the alien's statutory eligibility for the relief requested*. The decision shall be concluded with a statement of the hearing officer's disposition of the case which shall be (1) that the alien be deported, or (2) that the warrant of arrest be cancelled, or (3) that the alien be found to have established statutory eligibility for suspension of deportation, or (4) that the alien be granted voluntary departure at his own expense in lieu of deportation, or (5) that the alien be granted voluntary departure at his own expense in lieu of deportation with the additional privilege of pre-examination, or (6) that such other action be taken in the proceedings as may be required, for the appropriate determination of the same. *The hearing officer shall have no authority to exercise the Attorney General's powers* under section 19(c)(2) of the Immigration Act of February 5, 1917, as amended, or under the 7th proviso to section 3 of that act. [Emphasis added]

Sections 152.2 and 152.3(a), Title 8, Code of Federal Regulations (1949 Ed. 1951 Supp.) as amended Nov. 28, 1950 (15 Fed. Reg. 8109) read as follows:

§152.2. *Issuance and execution of warrants of deportation—(a) Issuance.* The officer in charge of the appropriate district shall issue a warrant of deportation in cases in which the Commissioner's order directs deportation.

* * * * *

§152.3. *Deportation—(a) Manner of.* If deportation is to be effected by vessel or airplane, notice of the proposed deportation of any alien shall be given to the transportation company concerned, together with a brief description of the alien and any other appropriate data, including the cause of deportation, physical and mental condition, and destination. Any request from the transportation lines to defer delivery of the alien for deportation shall be accompanied by a written agreement from the line concerned that it will be responsible for all detention expenses resulting from such deferment. Subject to applicable law and regulation the officer in charge of the appropriate field district, *the Assistant Commissioner, Enforcement Division, or the Commissioner, shall have exclusive authority* to designate at whose expense and to which country a deportable alien shall be deported.

Section 243(h) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1253(h)) reads as follows:

Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such

period of time as he deems to be necessary for such reason. June 27, 1952, c. 477, Title II, ch. 5, §243, 66 Stat. 212.

The Rules and Regulations at the time of the Immigration Act of 1924 and in 1928 when the plaintiff was admitted to the United States were not published in a Federal Register or other Code of Federal Regulations. However, they were printed by the Government Printing Office and were available in pamphlet form, dated March 1, 1927 [see Ex. B in evidence, pp. 125, 126]. The pertinent portions of Rule 9(a) and Rule 9(d) read as follows:

Rule 9(a). "Students" defined.

A bona fide student within the meaning of subdivision (e) of Section 4 of the Act of 1924 is a person at least 15 years of age who is qualified to enter and has definitely arranged to enter an accredited school, college, academy, seminary or university, particularly designated by him and approved by the Secretary of Labor, and who seeks to enter the United States *temporarily for the sole purpose of pursuing a definite course of study at such institution*, and who shall voluntarily depart from the United States upon the completion of such course of study.

Rule 9(d). Abandonment of status.

Any immigrant student admitted to the United States as a nonquota immigrant under the provisions of subdivisions (e) of Section 4 of the Immigration Act of 1924 who fails, neglects or refuses regularly to attend the school, college, academy, seminary or university to which he has been admitted or who otherwise fails, neglects or refuses to maintain the status of a bona fide student, or who is expelled from such institution, *or who engages in any business or occupation for profit*, or who labors for hire, shall be

deemed to have abandoned his status as an immigrant student and shall, upon the warrant of the Secretary of Labor, be taken into the custody and deported.

It will be remembered that the Secretary of Labor was the head of the Immigration Service prior to the time it was transferred to the Department of Justice.

By a General Order, No. 207 [Ex. C for Ident.], of December 21, 1933, Rule 3 of the Rules and Regulations of January 1, 1930, subdivision (h), was amended so as to define the term "status" as used in the Immigration Act of 1924 as follows:

1. The term "status" as used in the Immigration Act of 1924 means the condition of carrying on one of the particular limited activities for which an alien may be admitted under a subdivision of Section 3 or under subdivision (e) of Section 4. . . .

3. The admission of such alien by an examining officer, by Board of Special Inquiry, or by an officer in charge at a port, shall be for a reasonable, fixed period not exceeding one year and on condition that the alien shall maintain during his temporary stay in the United States the specific status claimed and shall voluntarily depart therefrom at the expiration of the time fixed or upon failure to maintain the specific status under which admitted.

Statement of the Case.

This is a case in which the appellant, a Korean, was admitted to the United States on July 6, 1928, as a student, under Section 4(e) of the Immigration Act of 1924 (8 U. S. C. 204(e), 1940 Ed.), and no permission to change that status has ever been granted. The record shows [Ex. D, 3/14/42 hrg. p. 4] that as of 1938 appellant abandoned the status of a student and was employed full time.

The long history of the proceedings whereby appellant, 30 years later, still resists deportation is summarized in a Chronology attached to this brief as Appendix A. It will be noted from the chronology that a warrant of arrest was first issued in December 1941 charging appellant as subject to being deported under the Immigration Act of 1924 "in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted." Hearings in deportation were commenced in March, 1942 [Ex. D, p. 1, of 3/14/42 hrg.] and resulted in the issuance of an order of deportation by the Commissioner of Immigration, with the privilege of voluntary departure.

Subsequently, in 1949, after the Supreme Court decision in *Sung v. McGrath*, 339 U. S. 33, and after the amendment of Section 19(c) of the Immigration and Nationality Act (8 U. S. C. 155(c) 1950 Supp.) hearings were reopened to allow appellant to apply for suspension of deportation, to which privilege he had not previously been eligible, and he was given notice of new deportation hearings in accordance with *Sung v. McGrath, supra*. At this hearing, which began on June 16, 1950, appellant was again served with the warrant of arrest [Ex. A, p. 2 of 6/16/50 hrg.]. The hearing officer again entered a proposed order of deportation [Ex. A] and proposed that the order granting voluntary departure be withdrawn. A copy of the decision of the hearing officer is attached to this brief, marked Appendix B. The Commissioner of Immigration ordered appellant's deportation "pursuant to law" and found appellant ineligible for the discretionary relief of suspension of deportation and denied voluntary departure. The Board of Immigration Appeals affirmed.

At the Court hearing on review of the deportation order, there was introduced into evidence, as Government's Ex-

hibit A, a certified copy of the hearings of 1950-52, and as Government's Exhibit D, a certified copy of the hearings of 1940-41. A list of exhibits in the District Court hearing, indicating pages in the Transcript of Record where referred to, is attached hereto, marked Appendix C.

Appellant belabors the point that the parties below agreed that the record for review was limited to Exhibit A—the 1950-52 hearings—(App. Br. p. 3) and strives mightily to ignore the 1940-42 hearings, which appellant claims are not properly part of the administrative record because they were not expressly introduced as exhibits in evidence in the 1950-52 administrative hearings. The whole structure of many of appellant's points on appeal rests on his ability to ignore the 1940-42 hearings as though they never occurred.

It is conceded that the 1940-41 administrative hearings were not marked as exhibits in the 1950-52 hearings or otherwise expressly incorporated therein, but the 1950-52 record of hearings shows that counsel for appellant examined the March and October 1942 administrative hearings before proceeding with the 1950 administrative hearings [Ex. A, p. 9 of 10/2/50 hrg.], and the hearing examiner certified that he had familiarized himself with the prior proceedings [Ex. A, 10/2/50 hrg., Ex. 3].

Based upon this fact, and upon appellant's contention (disputed by appellee) that the 1950-52 hearings pertained solely to the question of the grant or denial of suspension of deportation, appellant makes the contention that there is no evidence to support the finding of deportability.

It is stipulated in the record that sometime in 1952 appellant asserted a claim of physical persecution if deported to Korea, that evidence was submitted thereon to the Im-

migration Service, but that no determination either adverse to appellant or in favor of appellant's claim has yet been made by the Attorney General [R. 32, B-22].

Despite the fact that there is no adverse determination of appellant's claim of physical persecution, and the matter is still pending at the administrative level, appellant claims a violation of due process, as alleged in paragraph X of the Amended Complaint [R. 5]. However, contrary to that allegation, the order of deportation [Ex. A] directs plaintiff's deportation "according to law" and does not designate the place of deportation. When asked what country he specified to be deported to, in the event he was found deportable, appellant said "I want to go to my home country, Korea" [Ex. A, p. 57 of 1/15/51 hrg.].

The Court, while conceding that an adverse administrative determination regarding the claim of physical persecution might be reviewable to ascertain if there was an abuse of discretion in a "finding" under Section 23 of the Internal Security Act of 1950 or in an "opinion" under Section 243(h) of the 1952 Act, concluded that the allegation was premature, since the administrative remedy has not been exhausted and so stated in the Judgment below [R. 40].

An outline of Exhibits A and D in evidence, indicating the list of exhibits attached thereto during the administrative hearings, is set forth below. As in all Immigration files, the hearings are page-numbered in consecutive order. *March 14, 1942 Hearing* [Ex. D in evid.] pp. 1-9.

Exhibit 1—Warrant of Arrest.

Exhibit 2—Form I-255 Application for Suspension and voluntary departure at own expense.

Exhibit 3—Certificate of Admission.

June 16, 1950 Hearing [Ex. A in evid.] pp. 1-7.

Exhibit 1—Copy of Warrant of Arrest.

Exhibit 2—Central office Order to reopen case.

October 2, 1950 cont'd Hearing [Ex. A in evid.] pp. 8-43.

Exhibit 3—Certificate that hearing examiner has familiarized himself with prior proceedings.

Exhibit 4—Application for Suspension of Deportation.

Exhibit 5—Affidavit of Yong Whang.

Exhibit 6—Order of Board of Immigration Appeals of April 17, 1943.

Exhibit 7—Letter to Mr. Kimm advising of Board of Immigration Appeal's order.

Exhibit 8—3/28/47 memo. from file of Immigration Service *re* alien's attempt to secure exit visa.

Exhibit 9—5/2/43 Letter of Mr. Kimm to Immigration Service—acknowledges receipt of Justice Dept. order.

Exhibit 10—12/8/50 Report of Investigation.

Exhibit 11—7/11/50 F.B.I. report *re* check of their files.

Exhibit 12—10/13/50 Letter to Officer-in-Charge, San Ysidro.

Exhibit 13—10/16/50 Reply to No. 12.

January 15, 1951 Hearing, pp. 43-57.

Exhibit 14—Affidavit of Sung Tark Lin.

Exhibit 15—11/9/45 Letter—War Dept. to Mr. Kimm.

Exhibit 16—12/5/45 Letter War Dept. to Mr. Kimm.

Exhibit 17—6/27/46 Letter Robt. Cross to Mr. Kimm.

Exhibit 18—7/16/46—U. S. Army Military Govt., Korea, letter to Mr. Kimm.

I.

The District Court Received in Evidence the Administrative Records of Both the 1940-42 Hearings and the 1950-52 Hearings and the Review Below Was Therefore Not Limited to the 1950-52 Hearings.

The District Court admitted in evidence, for review, the administrative record of both the 1940-42 administrative hearings [Ex. D] and the 1950-52 hearings [Ex. A]. Appellant's assertion that the 1940-42 record "was not made a part of the later record" (App. Br. p. 21) and could therefore form no part of the "evidentiary basis for decision," is based on the fact that the 1940-42 hearings were not expressly marked as an exhibit in evidence in the 1950-52 hearings.

The conclusion does not follow from that fact. At the October 2, 1950 hearing [Ex. A, p. 9], the hearing officer presented to appellant's counsel the record of the hearings of March 14, 1942, and May 16 and October 27, 1942, and appellant's then counsel, Rose Rosenberg, said,

"Let the record show that I have examined File A-5-752-764 containing the hearings at Santa Ana, the proposed findings, conclusions and order, together with the exhibits attached thereto . . . also, the reopened hearing of June 16, 1950."

Further, if it were error to admit the 1940-42 hearings in evidence for review, which we do not concede, it was not prejudicial to appellant if the 1950-52 hearings support the decision of deportability, which we contend they do.

Further, we think it incorrect to say that the parties had an "agreement" regarding what constituted the record for review or that it was a "violation of the agreement by the parties" for the Court to admit Exhibit D in evidence. The real question here is whether or not the record for

review is complete, and no agreement of the parties one way or another can determine that question. The only result that can be achieved if the parties “agree” what constitutes the record is that neither will object to the record on appeal.

It is quite apparent in this case that appellant, in his difficult search for some point on appeal, would object regardless of which way the Court decided the matter; either objecting that Exhibit D is an improper part of the record because not identified as an exhibit in the 1950-52 hearings (although clearly under consideration by both the hearing officer and counsel for appellant); or objecting (as he does) that the 1950-52 hearings alone are incomplete and insufficient to support the finding of deportability. Either way the point has no real merit. What is more important is that it is clear that nothing has been omitted from the record in the District Court on this review action.

II.

In Both the 1940-42 and the 1950-52 Hearings the Record Unquestionably Shows Appellant Was Given Adequate Notice of Hearings on the Charges Contained in the Warrant of Arrest Relating to His Deportability as Well as the Question of Discretionary Relief of Suspension of Deportation.

As the District Court pointed out during the course of the hearings, if one is applying for the discretionary relief of suspension of deportation, how can it be said that he does not know that the Government seeks to deport him? [Record A 11-A 12 Supp. to hrg. May 13, 1957.]

Appellant contends in his Point II-B and C that the 1950-52 hearings were limited in purpose and scope to the question of extension of deportation and that appellant was

not clearly informed that the nature and purpose of the proceedings related also to his deportability. How does he explain the following language contained in Exhibit A in evidence, at page 2 of the June 16, 1950, hearing?:

“Q. I have here a warrant of arrest which I present to counsel and furnish you a copy and furnish counsel a copy, issued by the Central Office of the Immigration and Naturalization Service at Washington, D.C. on December 13, 1941, charging that Diamond Kimm or Kim Kang or Kin Sang or Soong Iop Kim who entered the United States at San Francisco, California on July 6, 1928, has been found in the United States in violation of the Immigration laws thereof to-wit:

The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.

Do you understand the charge contained in the warrant? A. Yes.

Q. This warrant is not shown to have been served however you are now furnished a copy of this warrant and it is served upon you. Are you the person named in this warrant of arrest? A. Yes.

Hearing Examiner to Respondent and Attorney of record:

Q. You are advised that the purpose of this hearing is to determine the right of the respondent to be and remain in the United States and to enable him to show cause, if there be any, why he should not be deported from the United States in conformity with law. Do each of you understand?

A. By Respondent: Yes.

A. By Counsel: I do.

By Hearing Examiner:

Q. In this proceeding you have the right to offer evidence to meet any evidence presented or adduced by the Government, to cross-examine any witnesses and to make objections to be entered on the record. Do you each of you understand?

By Respondent: Yes.

By Counsel: I do."

Said hearings were continued on October 2, 1950, and the record contains the following [Ex. A p. 9]:

"Hearing Examiner to Counsel: I present to you for your inspection record of hearing of March 14, 1942, May 16 and October 27, 1942, to which is attached the opinion of the Presiding Inspector of those hearings, and order of the United States Immigration and Naturalization Service at Washington, D. C. of April 6, 1949, and ask you to state when you have read and familiarized yourself with this transcript.

Counsel: Let the record show that I have examined file A5 725 764 containing the hearing at Santa Ana, the proposed findings, conclusions and order, together with the exhibits attached thereto.

Hearing Examiner to Counsel: I present for your inspection transcript of record of the reopened hearing conducted on June 16, 1950, and ask you to state when you have familiarized yourself with that transcript.

Counsel: Let the record show that I have examined the transcript of the hearing dated June 16, 1950, together with the exhibits attached thereto.

Hearing Examiner to Counsel: I understand at the hearing on June 16, 1950, you have indicated that you were a temporary counsel in this case. A. Yes.

Hearing Examiner to Counsel and Examining Officer: In accordance with regulations I now enter a certificate that I have familiarized myself with the prior proceedings. This certificate is now marked—

Exhibit No. 3

of the reopened hearing.”

Subsequently the hearings were continued to January 4, 1951, at which time Mr. Samuels, present counsel for appellant, requested a continuance in order to familiarize himself with the record and the matter was continued to January 8, 1951, and again to January 15, 1951.

At the January 4, 1951, hearing, the record shows [Ex. A, p. 22]:

“Q. Are you the same person as a Diamond Kimm whose hearing in deportation proceedings was continued on October 2, 1950, on motion of Counsel Rosenberg? A. Yes.

* * * * *

Q. Are you ready to proceed, Mr. Samuels? A. I—at this time I should like to move for a formal continuance of the present proceedings on the grounds that I have another matter set for trial this morning in the Superior Court of Los Angeles County and have not had an opportunity to familiarize myself with the record of the prior proceedings in this case. . . .”

In the hearing on January 15, 1951, is contained the following [Ex. A, p. 57]:

“Q. In the event you are found subject to deportation and ordered deported, what country do you specify as the country to which you shall be deported? A. I want to go to my home country, Korea.”

The June 6, 1950, letter of the Immigration Service to Mr. Kimm, addressed at 1441 West Jefferson Boulevard, Los Angeles, California, reads in part as follows [Ex. A]:

“You have heretofore been accorded a hearing to show cause why you should not be deported under a warrant of arrest issued March 14, 1942, charging that you have been found in the United States in violation of Immigration laws. In view of the decision of the Supreme Court in the *Sung v. McGrath* case, it will be necessary to accord you a *new* hearing under that warrant.

“You are requested to appear for the hearing to be held at 9 A.M. on June 16, 1950, in Room 110-E, W. M. Garland Building, 117 West Ninth Street, Los Angeles, California. . . .

* * * * *

“. . . The purpose of the hearing is to determine your right to be and remain in the United States under Immigration laws, and particularly Section 19 of the Immigration Act of February 5, 1917, as amended.” (Emphasis added.)

Subsequently, on January 15, 1951, the hearing officer made a proposed order of deportation and that the order granting voluntary departure be withdrawn, and on May 13, 1951, the Commissioner ordered deportation “pursuant to law,” and there was no objection at that time by appellant or his counsel that they did not know it was a hearing in deportation or that they had any other or additional evidence to present. How appellant could have been served with a proposed order of deportation, and participated in the hearing which also related to suspension, and now make the argument which he makes under Point II of his brief is not understandable.

Further, we cannot agree with the statements in the second and third paragraphs of appellant's brief, at page 24, that the Immigration Service had only the alternative of having reopened hearings for the limited purpose of considering eligibility for suspension, or conducting *de novo* deportation proceedings. He cites no law or authority for these statements other than the case of *Sung v. McGrath*, and as this Court is well aware, subsequent legislation relieved the Immigration Service of the necessity of compliance with Section 7 *et seq.* of the Administrative Procedures Act.

No authority is cited for the proposition that the Immigration Service could not hold new deportation hearings and consider the matter of suspension at one and the same time. In fact, this is normally the way the matter is considered. However, it happened in this case that at the time of the original hearings appellant was not eligible for suspension of deportation, but by subsequent amendment to the statute was entitled to have the matter considered.

Points ID and IE of appellant's brief, pages 27-29, do not require any answer, other than to point out that the warrant of arrest contained the additional words "in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.

III.

The Finding That Appellant Failed to Maintain the Exempt Status of a Student Is Supported by Reasonable, Substantial and Probative Evidence in Both the 1950-52 and 1940-42 Hearings.

Appellant's entry into the United States as a non-quota immigrant was based upon his exempt status as a student. Under Section 204 of the Nationality Act of 1924 a non-quota immigrant is defined (*supra*) as one who seeks to enter the United States "solely for the purpose of study," and Section 214 of the 1924 Act provides for the deportation of those who "have remained therein (the United States) for a longer time than permitted by this chapter or regulations thereunder." Section 215 provides for the giving of bond by such person to "insure that at the expiration of such time or upon the failure to maintain the status under which admitted, he will depart from the United States." Section 155 of the 1942 Act provides that any alien who shall be "found in the United States in violation of this chapter . . . shall . . . upon warrant of the Attorney General be taken into custody and deported."

Section 9(a) of the Rules and Regulations applicable in 1928 (*supra*) [Ex. B, pp. 125-126] defines a student in terms similar to the above statute, that is, as one who seeks to enter the United States "temporarily for the *sole* purpose of pursuing a definite course of study."

Rule 9(b), defining abandonment of status, provides for the deportation of any "immigrant student admitted to the United States as a non-quota immigrant . . . who engages

in any business or occupation for profit or who labors for hire.”

General Order No. 207 (*supra*) [Ex. C] defines “status” as the “condition of carrying on one of the particular limited activities for which an alien may be admitted . . .” and such admission shall be “on condition that the alien shall maintain during his temporary stay in the United States the specific status claimed or shall voluntarily depart therefrom at the expiration of the time fixed or upon failure to maintain the specific status under which admitted.”

Appellant, admitted to the United States in 1928, now 30 years later is claiming (App. Br., Pt. III) that there is no evidence to show that he has “abandoned his student status,” although he does concede in his brief that he accepted employment.

In the 1950-52 hearings on October 2, 1950, at pages 13-15, Exhibit A, is contained the following:

“Q. Mr. Kimm, will you state your employment during the time that you lived in Artesia? A. Yes. At that time I have been working as chemist at Bergs Metal Corporation located on 28th at Long Beach Boulevard.

Q. That was for the entire period of your residence in Artesia? A. Yes.

Q. Where were you employed after that? A. When I moved into town I did some work, I continued that work until 1944, January. I don't know the exact date.”

Further on he relates that:

“In 1945 I started work as assistant chemist again at Tripplet and Barton located on Century Boulevard in Fullerton, California, I don’t recall the exact number, until January of 1945.”

On page 14:

“Q. Where was your employment? A. At this time my own business, printing.”

(This was referring to a period in 1948.)

“Q. Did you run a print shop then? A. Yes.”

The 1940-42 hearings are replete with evidence of abandonment of student status and employment for hire and in his own business. At the very beginning of the hearings on March 14, 1942, at page 4, the following is contained:

“Q. When did you last attend school? A. July 1938, I think.

Q. Have you been enrolled in any school since that time? A. No.

Q. Why did you abandon your status as student in June 1938? A. It was hard to operate any small business and continue my study and research work which requires full time, so I had to give up either one of them and for study I got to get means to study and it is very hard. Times were getting harder and harder.”

IV.

Appellant Was Found Ineligible for Suspension of Deportation, Among Other Reasons, for Failure to Prove Good Moral Character for the Preceding Five Years and Because of His Refusal to Answer Questions Which Might Establish His Deportability on the Grounds Specified in Section 19(d) of the Act of 1917 and Section 137 Thereof, in Which Event He Would Be Ineligible for Suspension.

In the second half of the January 15, 1951, decision of the Hearing Officer [Ex. A], a copy of which is attached as Appendix B to this brief, the Hearing Officer sets forth fully the factors relating to discretionary relief, makes findings of fact and concludes as a matter of law that the appellant failed to establish statutory eligibility for suspension of deportation.

Under Section 19(c), as amended (8 U. S. C. 155(c)) (*supra*), the Attorney General *may* suspend deportation in the case of any alien (other than one to whom subsection (d) is applicable) who has proved good moral character for the preceding five years, if he finds such alien has resided continuously in the United States for seven years.

It is conceded appellant meets the seven-year residence requirement, but the Hearing Officer found that he had failed to prove good moral character for the past five years in that he declined to answer questions which might establish that he was deportable on the grounds specified in subsection (d).

Subsection (d) (*supra*) provides that subsection (c) shall not be applicable to an alien deportable under Section 137 of the same title. Section 137 relates to aliens

who are members of or advise, advocate or teach . . . the overthrow by force or violence of the government of the United States. As amended in 1952, this section (now found in 8 U. S. C. 1182) specifically reads: “. . . aliens who are members of . . . the Communist Party.”

Appellant, in the 1950-52 hearings, declined to answer any questions relating to whether he was then a member of the Communist Party or if he had ever been a member of the Communist Party. “Yes,” answers to these questions would have established respondent’s deportability under Section 137, and therefore pursuant to Section 19(d) he would have been ineligible for relief of suspension of deportation under Section 19(c), as well as for failure to carry his burden of establishing good moral character.

The Hearing Officer’s decision, affirmed by the Board of Immigration Appeals, is therefor proper in holding appellant ineligible for suspension. The Hearing Officer’s decision also finds appellant ineligible for suspension because he *failed to affirmatively establish his good moral character*, and points out in the body of the opinion that “In view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.”

Appellant cites the *Konigsberg* and *Schware* cases (*Konigsberg v. State of Calif.*, 353 U. S. 252, and *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232), which we think are sharply distinguishable from the present case.

In this case the Immigration Service did *not* infer from appellant’s failure to answer questions that he *was not* a person of good moral character as was the case in *Konigsberg* and *Schware*. Rather, the hearing officer

makes it clear in his findings [Fdgs. 1 and 5 at p. 6 of the Hearing Officer's Opin. in Ex. A] that the holding is that appellant is ineligible for the discretionary relief of suspension because (1) he *failed to sustain his burden of affirmatively proving good moral character* because he did not testify, either on his own initiative or in answer to questions propounded to him, on his affiliations with organizations and thereby closed the door to a large body of material which might or might not bear on his good moral character, and (2) he failed to show he is eligible for the relief as a person who is not a member of proscribed organizations and therefore is not barred by the exception in Section 19(d). This latter holding is not placing on the appellant an impossible burden (as suggested in appellant's brief, p. 33) of proving that he was not a member of *any* class excluded from a grant of relief. Here he is specifically asked questions with regard to one class of aliens who would be ineligible for relief, the class mentioned in Section 19(d), to wit: aliens who are affiliated with proscribed organizations, and he remains silent.

He declines to furnish evidence on this one phase when his attention is specifically directed to it, and in a proceeding where, as this Court said in *Jimenez v. Barber* (9 C. A. Jan. 1958), 252 F. 2d 550 at 554:

“. . . the refusal to answer questions was in a proceeding in which the applicant sought nothing to which he was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion. . . .”

It is in the *Jimenez* case also (*supra*) that this Court upholds a similar denial of suspension of deportation. In that case, in an administrative hearing on an application for suspension of deportation under Section 155, *Jimenez*

refused to answer questions about his membership in or affiliation with certain organizations, including but not limited to the Communist Political Association and the Communist Party, not only pertaining to the five-year period prior to the application for suspension, but to the years prior thereto. The application for suspension was denied and in subsequent court proceedings (*Jimenez v. Barber*, 235 F. 2d 922, cert. den. 78 S. Ct. 327) a judgment dismissing the action for declaratory relief and injunction was affirmed.

Subsequently, Jimenez filed with the Immigration Service a motion to reopen proceedings and for stay of execution and offered to answer the questions, and thereafter was denied a temporary restraining order by the District Court to preserve the *status quo* pending decision of the Board of Immigration Appeals on his motion to reopen. The Court of Appeals granted an *ex parte* order, temporarily restraining deportation until January 30, 1958. On January 24, 1958, appellant noticed for hearing a motion to extend this order and appellee filed a motion to dissolve the restraining order and dismiss the appeal from the denial of the District Court. This Court held that no substantial question was presented on the appeal and therefore denied the extension and dismissed the appeal as frivolous. In arriving at that decision, the Court necessarily had to approve the view that the failure to answer questions concerning membership in the proscribed organizations was sufficient grounds upon which to deny the application for suspension. The Court said, at page 553:

“During the hearing on his application to suspend deportation, Jimenez declined to answer any questions concerning his past affiliations, memberships, and beliefs. It cannot be questioned that Jimenez was entitled to adopt this course, so that he could test the

right of the hearing officer to propound such questions. As stated in this court in *Jimenez v. Barber*, 226 F. 2d 449, the constitutional questions which he thus chose to raise were substantial ones.

“In choosing this course, however, Jimenez was required to accept the hazards as well as the possible advantages which it afforded. Had his refusal to answer proper questions been in an ordinary civil action in which he was plaintiff, a trial court judgment would unquestionably have been entered against him. Were he successful in establishing, on appeal, that the questions were improper, this would gain him a new trial. But if unsuccessful, he would have no standing to demand reopening of the case on the strength of an offer to answer the question. Likewise, where a witness has brought down upon himself a conviction for contempt because of a mistaken belief that he could refuse to answer certain questions, he cannot escape the penalty by making an offer, long after the proceedings have ended, to answer the questions propounded.

“The case before us is much less favorable to Jimenez than the analogies which have been cited. *Here, the refusal to answer questions was in a proceeding in which the applicant sought nothing to which he was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion.* The hazards in adopting an obstructive attitude in such a proceeding must be at least as great as those involved in cases where established rights are sought to be enforced or protected.” (Emphasis added.)

V.

No Finding Regarding Physical Persecution Is Required as a Condition to Determination of Deportability, Which Is a Quasi-Judicial Function of the Hearing Officer; It Is the Function of Enforcement Officers to Determine the Place to Which the Alien Shall Be Deported; the Law and Regulations Contemplate That First a Determination of Deportability Be Made and When That Order Has Become Final, Then the Enforcement Officer Shall Make a Determination as to the Place to Which the Alien Shall Be Deported. Any Claim of Physical Persecution Should Then Be Separately Determined.

In Appellant's Supplemental Brief, Point V, it is argued that the deportation order herein is not lawful, because no finding was made by the Attorney General as a part of the deportation order, regarding possible physical persecution as a result of deportation. We are aware of no authority which holds that the designation of the country of deportation and a ruling on the issue of physical persecution must take place as part of the process of adjudicating deportability, or that it is a precondition to an order of deportation. The cases merely hold that where a claim of physical persecution is raised under the appropriate law, the Attorney General must find that there will be no such persecution in the designated country before *deporting* the alien to that country, as distinguished from entering an order of deportability.

The claim is based on Section 23 of the 1950 Internal Security Act (see statutes involved, *supra*) but the regulations which were applicable at the time that act became effective on September 23, 1950, make it clear that a distinction was made between the procedures for determining

deportability and the procedures for determining to which country the deportable alien should be sent. The former, being quasi-judicial in nature was entrusted to hearing officers who were authorized to make findings and decisions with respect to deportability and discretionary relief from deportation, but were specifically forbidden "to designate . . . to which country the alien shall be deported," see Section 151.5(a) of Title 8, Code of Federal Regulations (Statutes and Regulations Involved *supra*).

It was only after deportability had been adjudicated that the regulations contemplated a determination should be made as to which country a deportable alien should be sent, and the authority to make such designation was delegated exclusively to enforcement, as distinguished from adjudicative officers, *i. e.*, officers in charge of field districts, the Assistant Commissioner of the Enforcement Division or the Commissioner. See Section 152.3(a) of Title 8, Code of Federal Regulations (Statutes and Regulations Involved *supra*).

The administrative file here shows that the alien was asked what country he desired to be deported to, if found deportable, and he stated "Korea." However, the deportation order as entered by the hearing officer and affirmed by the Board of Immigration Appeals merely recites that appellant shall be deported "according to law," which for the first time, after the enactment of the Internal Security Act of 1950, gave the alien a choice of country. Subsequently the Act of 1952 containing Section 243(h) (Statutes and Regulations *supra*) enacted the provision, under which the appellant is now seeking in a separate proceeding to establish his claim of physical persecution. As conceded at the trial and found by the District Court, no adverse decision to the appellant has been made in that proceeding.

The case of *Harisiades v. Shaughnessy*, 187 F. 2d 137 (C. A. 2, 1951), bears out the above procedures. There the alien at an administrative deportation hearing on October 15, 1946, testified he thought he would be persecuted if sent to Greece. The final deportation order and the District Court's order dismissing the writ of *habeas corpus* were entered before enactment of the Internal Security Act of 1950, which for the first time gave the alien a choice of country and precluded deportation to any country in which the Attorney General should find that the alien would be subjected to physical persecution. Since these new provisions had become part of the deportation statute while the matter was pending on appeal, the Court of Appeals, although sustaining the finding of deportability, remanded the case to the District Court with directions to hold it in abeyance pending compliance by the Attorney General with the new provisions. This disposition of the matter shows clearly the severability of the merits (*i. e.*, the question of deportability) from the collateral issue of physical persecution.

Moreover, the Second Circuit's *Harisiades* case and the cases of *Sang Ryup Park v. Barber*, 107 Fed. Supp. 603 (N. D. Cal., May 9, 1952), and *Chen Ping Zee v. Shaughnessy*, 107 Fed. Supp. 607 (S. D. N. Y., March 18, 1952), were all decided before the enactment of the Immigration and Nationality Act of 1952. That the execution of pre-1952 Act orders of deportation is now governed by Section 243(h) of the 1952 Act is shown by *Dolenz v. Shaughnessy*, 206 F. 2d 392 (C. A. 2, 1953). The alien there had been denied a stay of deportation on a physical persecution claim on May 21, 1952, before enactment of the 1952 Act, and the administrative decision was sustained on *habeas corpus*, 107 Fed. Supp. 611, affirmed 200 F. 2d 288 (C. A. 2, 1952), cert. den. 345 U. S. 928. He

thereupon moved in the District Court for rehearing on the ground of newly discovered evidence. The motion was denied. By that time the 1952 Act had taken effect. The Court of Appeals sustained the appellee's contention that Section 243(h) of the 1952 Act governed, citing *Harisides* and other Second Circuit decisions (206 F. 2d at p. 394, fn. 6).

Here the final order of deportation was made on January 22, 1952, when the Board of Immigration Appeals dismissed the appeal. The Complaint for review of that deportation order was filed in the District Court on September 21, 1956. It seems clear that no attempt has been made to execute a warrant of deportation pending the Attorney General's determination of the claim of physical persecution. By not appealing the 1952 order of deportation for four years, the appellant has thereby extended the ultimate date when said order may be upheld as valid and, likewise, the ultimate date when the warrant of deportation may be attempted to be executed by the Immigration Service.

Appellant (App. Supp. Br. p. 5) cites the *Accardi* case (*Accardi v. Shaughnessy*, 347 U. S. 260 at 268), for the proposition that status and rights acquired under former law are preserved and protected by virtue of the savings clause in Section 405(a) of the Nationality Act. (We do not find that *Accardi* is authority for that proposition.) As we read that decision, it held that in considering the application for suspension of deportation, which under the rules and regulations is properly considered at the time of

determining the deportability of the alien, the Immigration Service “failed to exercise” its discretion *re* suspension because it considered a list which the Attorney General had published naming persons to be deported, and in effect thereby adopted the Attorney General’s determination, rather than exercising its “own” determination.

It has long been the practice and is well established under the rules and regulations that the application for suspension of deportation must be made at the time of the Immigration hearings regarding deportability. This is a far different thing from a consideration of a claim of physical persecution. The evident purpose of the statute and regulations to have the physical persecution matter separately determined by the enforcement officers accords with the practicalities of the matter.

There is little value in having a determination regarding claim of physical persecution made prior to the time that the deportation order has been held valid. It might be several years before the deportation order is upheld by the Court on review, and the question of whether or not the alien would be subjected to physical persecution if deported to a specified country would and might indeed change during the two years. It is likewise clear that it is necessary to first invoke the procedure with regard to determining the place to which the alien shall be deported, and to determine whether or not a particular country will accept the alien. It is useless to determine whether or not physical persecution might result if deported to a country as to which there is no possibility of the alien being deported,

or as to a country where during the years the situation might change.

Nor is the case of *Yanish v. Barber*, 211 F. 2d 467, cited by appellant, in point. In that case, the Immigration Service had been enjoined by the Court from requiring the petitioner to amend the terms of bail bond to require periodic visits by him to the Immigration Service, at a time when the statutes did not support such procedure. Subsequently, Congress enacted Section 242(c) (8 U. S. C. A. 1252(c)) which would have made the requirement valid, and after that enactment the Immigration Service, without moving to modify or set aside the injunction, again gave the petitioner notice to appear and oppose the demanded bond. The Court held that the Immigration Service should obey the injunction unless and until set aside in proceedings brought for that purpose and remanded the case with directions to the Court below to issue an order to the Immigration Service to show cause why it should not be held in contempt. It did not hold that the new law was not applicable. Appellant considers the case analogous apparently on the theory that under Section 23 of the 1950 Act the Attorney General was required to make a finding regarding physical persecution as a condition to entering an order of deportability (which, as we have shown *supra*, is not a valid argument), and since this is not so, the argument fails.

Conclusion.

It is submitted that the order of the District Court affirming the decision of the Board of Immigration Appeals as to the validity of the deportation order and dismissing the defendants Carnahan and Barber as improper and unnecessary parties, should be affirmed. By stipulation and order of this Court, Richard C. Hoy, District Director of the Los Angeles office of the Immigration Service, has been substituted as defendant in the place and stead of Albert Del Guercio, resigned.

Dated: June 18, 1958.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Appellee.

APPENDIX A.

Chronology.

Diamond Kimm.

- July 6, 1928. Appellant Kimm—Korean—admitted to United States as student under 8 U. S. C. 204(e) (1940 Ed.).
1935. Appellant goes to Tijuana and returns.
1938. Appellant abandons status as a student and is employed full time [see Ex. A in Evid.].
- Dec. 13, 1941. Warrant of Arrest issued by Immigration Service charges appellant is unlawfully in United States—failure to maintain status as a student.
- March 4, 1942. Special Inquiry Hearing—presiding inspector—appellant held deportable. Recommended voluntary departure within 60 days or at end of hostilities.
- Oct. 27, 1942. Reopened hearing *re* application for voluntary departure.
- April 17, 1943. Commissioner of Immigration and Naturalization, Washington, D. C., issues order of deportation and voluntary departure, as above.
- June, 1946. Administrative Procedures Act effective (prior hearings valid under subsequent decision of Supreme Court in *Sung v. McGrath*).
- July 1, 1948. Section 19(c) amended (8 U. S. C. 155(c) 1940 Ed.) to apply to Japanese and Koreans not previously racially eligible to apply for suspension.

- May 19, 1949. Notice of reopened hearing, to allow application for benefits of Section 19(c) as amended [Ex. A].
- Febr. 20, 1950. Supreme Court decision, *Sung v. McGrath*, says Administrative Procedures Act applies to Immigration and Naturalization Service.
- June 6, 1950. Notice of new hearing *re* deportation, as required by *Sung v. McGrath* [Ex. A].
- June 16, 1950. Hearing—conducted per Administrative Procedures Act. (New hearing—1942 hearings not incorporated—warrant of arrest again served on appellant at hearing.)
- July 12, 1950. Notice of further hearing on October 2, 1950 [see Ex. A in Evid.].
- Sept. 27, 1950. Act excepts Immigration and Naturalization Service from Sections 5, 7 and 8 of Administrative Procedures Act.
- Oct. 2, 1950. Further *hearing*.
- Sept. 23, 1950. Internal Security Act of 1950, in Section 23 (8 U. S. C. 156, 1940 Ed. 1951 Supp.) provides no alien shall be deported to any country in which “*the Attorney General shall find*” alien would be subject to physical persecution.
- Dec. 19, 1950. Notice of hearing continued on January 4, 1951 [see Ex. A in Evid.].
- Jan. 15, 1951. Hearing Officer makes proposed Order of Deportation and that order granting voluntary departure be withdrawn.

- May 13, 1951. Commission orders deportation “pursuant to law”—finds appellant ineligible for suspension of deportation and denies voluntary departure.
- Jan. 22, 1952. Board of Immigration Appeals dismisses appeal.
- Dec. 24, 1952. Section 243(h) of the Immigration and Nationality Act of 1952 provides (8 U. S. C. 1253(h)) that the Attorney General withhold deportation of alien to any country in which “*in his opinion the alien would be subject to physical persecution.*”
- Sept. 21, 1956. Complaint for Review of Deportation Order filed.
- April 24, 1957. Amended Complaint filed.
- April 30, 1957. Answer to Amended Complaint filed.
- July 22, 1957. Findings of Fact, Conclusions of Law and Judgment docketed and entered.

APPENDIX B.

U. S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

LOS ANGELES 13, CALIFORNIA

Alien File Number A5 725 764. Jan. 15, 1951.

Decision of the Hearing Officer in re Diamond Kimm
or Kim Kang or Kin Sang or Soong Iop Kim.

Charges:

Warrant: The Immigration Act of 1924, in that he
has remained in the United States after failing to main-
tain the exempt status of a student under which he was
admitted.

Lodged: None.

. . .

I. DISCUSSION OF THE EVIDENCE—DEPORTABILITY.

The respondent is a native and citizen of Korea by birth
in that country on October 5, 1901.

The respondent testified that he last entered the United
States about July 1935 at San Ysidro, California, and at
the time of that entry was admitted to resume his status
in the United States as a student. He stated that at the
time of that entry it was his intention to resume his stu-
dent status under which he had previously been admitted
into the United States.

The respondent was first admitted into the United States
on July 6, 1928, at San Francisco, California, ex SS
"Tenyo Maru" as a student under Section 4(e) of the Im-
migration Act of 1924.

The regulations in effect at the time the respondent was
originally admitted into the United States provided that a
student was admitted for such period as he maintained his

student status. These regulations were in effect until July 1932. General Order 94 issued on September 12, 1932, provided that an alien student might go to Mexico and certain other countries for a period not exceeding six months, then be readmitted without a new visa if he was found otherwise admissible and established to the satisfaction of the appropriate immigration officials that he had not terminated his student status.

After the respondent's admission into the United States on July 6, 1928, at San Francisco, California, he remained continuously in the United States until a date about the month of July 1935 when he made a temporary visit to Mexico, visited in that country approximately three hours, and was readmitted to the United States on the same date that he departed, being readmitted to resume the status under which he was originally admitted, that of a student.

The respondent testified that during 1938 he abandoned his status as a student and sought and accepted full-time employment.

The charge in the warrant is sustained.

II. FINDINGS OF FACT—DEPORTABILITY.

Upon the basis of all the evidence presented, it is found:

- (1) That the respondent is an alien, a native and citizen of Korea;
- (2) That the respondent was admitted to the United States at San Francisco, California, on July 6, 1928, as a student, under Section 4(e) of the Immigration Act of 1924;
- (3) That the respondent last entered the United States about July 1935 at San Ysidro, California, being readmitted to resume his student status;

- (4) That the respondent abandoned his status as a student during 1938;
- (5) That since the respondent abandoned his status as a student he has not departed from the United States.

III. CONCLUSION OF LAW—DEPORTABILITY.

Upon the basis of the foregoing findings of fact, it is concluded:

- (1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, as amended, the respondent is subject to deportation on the ground that he has remained in the United States after failing to maintain the exempt status of a student under which he was admitted.

IV. FACTORS RELATING TO DISCRETIONARY RELIEF.

The warrant of arrest in this case was issued on December 13, 1941, and hearings in deportation proceedings were accorded the respondent on March 14, 1942, May 16, 1942, and October 27, 1942. In those hearings the respondent applied for voluntary departure at his own expense in lieu of deportation. This privilege was recommended by the Presiding Inspector at that hearing, and on April 17, 1943, the Board of Immigration Appeals entered an order that an order of deportation be not entered at that time, but that the alien be required to depart from the United States without expense to the government to any country of his choice within 90 days following the issuance to him of an exit permit, or within 90 days following the date on which the exit permit ceased to be required in such cases.

The records of the Service contain copies of applications for exit permits in the case of this respondent, the first one dated May 27, 1945, and the second dated January 24, 1947. However, the respondent claims that he was never notified that an exit permit had been issued in his case.

On April 6, 1949, the Central Office of the Service ordered that the hearing in this case be reopened so that the alien might apply for the benefits of the Amendment to Section 19(c) of the Immigration Act of 1917, as amended on July 1, 1948, by Public Law 863.

The first reopened hearing in the case was conducted on June 16, 1950, and at that time the respondent indicated that he wished to apply for suspension of deportation and he was furnished the appropriate forms with which to do so.

The respondent is married and has one child and that wife and child reside in Korea. The wife and the child of respondent accompanied him to the United States at the time of his admission on July 6, 1928, and at that time were admitted as temporary visitors. During the year 1937 they were permitted to depart voluntarily from the United States in lieu of deportation. His wife and child have not returned to this country since then.

The respondent has resided in the United States continuously for more than seven years and was residing in the United States on July 1, 1948. However, in considering his presence in the United States during this time he was in this country as a non-resident alien student from 1928 until 1938 and the warrant for his arrest was issued on December 13, 1941.

The respondent has presented two affidavits from persons who have known him, one since 1943 and the other

since 1928, and both allege him to be a person of good moral character. He has also presented a photostatic copy of a letter showing that he during 1945 had been attached to a Strategic Services Unit of the Office of Strategic Services of the War Department. He has also presented letters written to him showing that he had been considered for a position in Korea under the War Department at a salary of more than \$5,000 a year, but he testified that he did not receive that position. He also presented a letter on the stationery of the Headquarters of the Office of the Military Governor, United States Army Military Government in Korea, Seoul, Korea, dated July 16, 1946, showing that the wife of the subject had been working one of the American Army dispensaries in Korea. This letter also requested that the respondent send that headquarters a summary of his personal background, education and experience, in support of his application for work with the United States Military Government in Korea.

During the course of the hearing on October, 1950, the respondent was asked if he was a member of the Communist Party, and on the advice of Counsel he did not answer the question on the ground that it would tend to incriminate him. At a resumed hearing after a change of counsel this was pointed out to new counsel and he stood on that record. On January 15, 1951, the respondent was asked if he had even been a member of the Communist Party of the United States and he answered that he declined to answer that question on the ground of self incrimination.

The provisions of Section 19(c)(1) and (2) of the Immigration Act of 1917, as amended, provide that certain relief may be granted aliens within the discretion of the Attorney General. This relief is purely discretionary with

the Attorney General and no right to relief vests with the alien. In considering an alien for discretionary relief the Government of the United States is entitled to know his entire background and whether or not he is or has been a member of a proscribed organization, and any information which would show whether or not he is a person to whom the discretionary relief provided in Section 19(c) should be extended. By declining to answer questions as to whether he had ever been a member of a proscribed organization, on the ground of self incrimination, the respondent denies the government of knowledge to which it is entitled and the respondent places himself in a class of aliens to whom discretionary relief as provided by Section 19(c) of the Immigration Act of 1917, as amended, is not available.

In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.

The respondent has no relatives in the United States and no one in this country is dependent upon him for support and maintenance. He owns no property except a one-third interest in some printing machinery which he values at about \$750.00 and some books which he values at about \$50.00. He had no finances except that he claims to have now furnished the money to the person who placed a \$500.00 bond for the release of the respondent in deportation proceedings.

The respondent has stated that in the event he is found subject to deportation and ordered deported he specifies Korea as the country to which he shall be deported.

V. DISCRETIONARY RELIEF—FINDINGS OF FACT.

Upon the basis of all the evidence presented, it is found:

- (1) That the respondent is a person of the Korean race;
- (2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;
- (3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self incrimination;
- (4) That the respondent has resided in the United States continuously for 7 years or more and was residing in the United States on July 1, 1948;
- (5) That the respondent declines to answer questions on the ground of self incrimination which might establish that the respondent is deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended.

VI. DISCRETIONARY RELIEF—CONCLUSIONS OF LAW.

Upon the basis of the foregoing findings of fact, it is concluded:

- (1) That under Section 19(c)(1) of the Immigration Act of 1917, as amended, the respondent has failed to establish statutory eligibility for voluntary departure in lieu of deportation;
- (2) That under Section 19(c)(2) of the Immigration Act of 1917, as amended, the respondent has failed to establish eligibility for suspension of deportation.

VII. RECOMMENDED ORDER.

It is recommended that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

It is further recommended that the order of the Board of Immigration Appeals dated April 17, 1943, granting voluntary departure in lieu of deportation to this alien, be withdrawn.

/s/ JOHN B. BARTOS

John B. Bartos,

Hearing Officer.

APPENDIX C.

List of Exhibits.

With Page References in Transcript of Record.

Kimm v. Barbour, et al.

<u>Govt's Exhibits</u>	<u>Description</u>	<u>Identified</u>	<u>In Evidence</u>	<u>Pages</u>
A	Certified copy of Administrative File	X	X	3-4, 43, 44
B	Photostat of Portion of pamphlet "Im- mig. Laws & Rules of Mar. 1, 1927, U. S. Dept. Labor" in- cluding pp. 11, 125, 126.	X	Excluded	18, 19
C	Photostat of Gen. Order 207, dated Dec. 21, 1923, de- fining "status."	X	Excluded	19-21
D	Certified copy of 1941-42 Immigra- tion hearings.	X	X	21-24
<u>Pltf's Exhibits</u>				
1	Immigration form letter X to Plain- tiff dated Feb. 8, 1952.	X	Excluded	4-18

No. 15781

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN MILLER, and ELIAS MILLER and PAUL MILLER, as Executors of the Estate of George Miller, Deceased.

Appellants,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate of Delcon Corporation, Bankrupt,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

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1954

PAUL P. MILLER, Clerk

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Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

Introductory Statement.

This appeal concerns a controversy between appellants (holders of a purchase money chattel mortgage) and appellee (trustee in bankruptcy) involved in an involuntary bankruptcy case pending in the District Court of the United States, Southern District of California, Central Division.

Appellants' purchase money chattel mortgage was recorded on *August 19, 1954, which was more than four months prior to the filing of the involuntary petition in*

the pending bankruptcy case. On October 24, 1955, appellants filed a verified proof of claim in the bankruptcy case alleging that they held a purchase money chattel mortgage lien on specified assets of the bankrupt in the amount of \$141,742.50. On July 5, 1956, the trustee in bankruptcy filed objections and a counterclaim thereto (which was thereafter amended) alleging that appellants' chattel mortgage was void in its entirety against all creditors, due to its late recordation.

On May 6, 1957 an order was made by the Referee that the chattel mortgage was not void in its entirety; that it was void only in the amount of \$8,906.95 (same representing the amount of provable claims of the existing creditors *prior to the recordation* of the chattel mortgage on August 19, 1954; but that it was valid against the provable claims of the creditors who came into existence *after the recordation of the chattel mortgage on August 19, 1954.*

On May 21, 1957, the trustee in bankruptcy filed a petition for review of the Referee's order alleging that the Referee erred in his conclusion of law that the chattel mortgage was void only to the extent of the provable claims which arose prior to the recordation of the chattel mortgage, and that it was valid against the claims of the creditors who came into existence after the recordation of the chattel mortgage.

On July 30, 1957, an order was entered by the District Judge sustaining the Trustee's petition for review and adjudging that the chattel mortgage was void in its entirety against all creditors, including those who came into existence after the recordation of the mortgage (albeit the chattel mortgage liens had been duly perfected

more than four months prior to the filing of the involuntary petition in the bankruptcy matter).

On August 12, 1957, a notice of appeal was filed by appellants to this Honorable Court from the order of the District Court reversing the aforesaid order of the Referee [R. p. 70].

Jurisdictional Statement.

I. Jurisdiction in the District Court is vested by virtue of the provisions of the Bankruptcy Act as amended; and it is based on the following proceedings and pleadings in the pending bankruptcy case.

1. The involuntary bankruptcy petition filed February 23, 1955 [R. p. 3].

2. The order of general reference filed February 23, 1955 [R. p. 6].

3. The order of adjudication entered by the Referee on March 16, 1955 [R. p. 6].

4. The order appointing appellee trustee entered by the Referee on April 25, 1955 [R. p. 7].

5. The verified proof of claim filed by appellants on October 24, 1955 [R. p. 8].

6. The objections and counterclaim to appellants' aforesaid proof of claim filed by the trustee on July 5, 1956 [R. p. 16].

7. The answer to said objections and counterclaim filed by appellants on August 20, 1956 [R. p. 20].

8. The amendment to his counterclaim filed by the trustee on November 28, 1956 [R. p. 30].

9. The findings of fact, conclusions of law and order of the Referee filed on May 6, 1957 [R. p. 53].

10. The petition for review from the Referee's aforesaid order filed by the trustee on May 21, 1957 [R. p. 60].

11. The order of the District Judge reversing the order of the Referee filed on July 30, 1957 [R. p. 63].

II. Jurisdiction is vested in this court under Section 24 of the Bankruptcy Act and 28 U. S. C., Section 1291.

III. The facts disclosing the basis of jurisdiction of the District Court and of this court are set forth in the Findings of the Facts of the Referee which were adopted by the District Judge.

Questions Presented for Decision.

The facts are not in dispute. They are summarized (a) in the Referee's memorandum decision [R. beg. at p. 32]; (b) in the findings of facts of the Referee [R. beg. at p. 53]; and (c) in the order of the District Judge upon the trustee's petition for review [R. beg. at p. 63].

The legal issues presented for decision are as follows:

I.

DOES THE CALIFORNIA STATE LAW REQUIRING PROMPT RECORDATION OF CHATTEL MORTGAGES APPLY EQUALLY TO RECORDATION OF PURCHASE PRICE CHATTEL MORTGAGES?

II.

ASSUMING THAT THE CALIFORNIA STATE LAW REQUIRING PROMPT RECORDATION OF ORDINARY CHATTEL MORTGAGES IS EQUALLY APPLICABLE TO RECORDATION OF PURCHASE PRICE MONEY MORTGAGES, WAS THE DELAY OF 79 DAYS OF THE RECORDATION OF THE INSTANT PURCHASE PRICE MORTGAGE JUSTIFIED UNDER THE FINDINGS OF THE COURT?

III.

ASSUMING THAT SUCH DELAYED RECORDATION OF THE CHATTEL MORTGAGE WAS NOT JUSTIFIED UNDER THE CALIFORNIA STATE LAW, WAS THE CHATTEL MORTGAGE BY REASON THEREOF VOID AGAINST THE BANKRUPT'S CREDITORS WHO CAME INTO EXISTENCE AFTER THE RECORDATION THEREOF ON AUGUST 19, 1954, WHICH WAS MORE THAN FOUR MONTHS PRECEDING BANKRUPTCY?

IV.

DID CONGRESS HAVE THE CONSTITUTIONAL POWER UNDER SECTION 70e OF THE BANKRUPTCY ACT TO DEPRIVE APPELLANTS OF THE SUBSTANTIVE PROPERTY RIGHTS ACQUIRED BY THEM UNDER THEIR PURCHASE PRICE MORTGAGE CONTRACT UNDER THE CALIFORNIA STATE LAW?

V.

IN ANY EVENT, WERE APPELLANTS GUILTY OF CONVERSION OF THE MORTGAGED CHATTELS BY THEIR REPOSSESSION THEREOF ON DECEMBER 29, 1954 (PRIOR TO BANKRUPTCY) AND BY THEIR SUBSEQUENT SALE THEREOF (AFTER BANKRUPTCY) TO A BONA FIDE PURCHASER AT A SUM REPRESENTING THE FAIR VALUE THEREOF IN VIEW OF THE FOLLOWING FACTS:

1. THAT THE CHATTEL MORTGAGE WAS VALID ON THE DATE OF ITS EXECUTION AND DELIVERY ON JUNE 1, 1954 AGAINST ALL CREDITORS, AT WHICH TIME THE BANKRUPT WAS SOLVENT (WHICH WAS MORE THAN EIGHT MONTHS PRIOR TO BANKRUPTCY).

2. THAT APPELLANTS HAD THE LEGAL RIGHT TO THE REPOSSESSION OF THE MORTGAGED CHATTELS IN DECEMBER OF 1954 UNDER THE EXPRESS TERMS OF THE VALID PURCHASE PRICE MORTGAGE, THE BANKRUPT THEN BEING IN DEFAULT THEREUNDER.

3. THAT NO DEMAND HAS BEEN MADE ON APPELLANTS FOR THE SURRENDER OF THE REPOSSESSED MORTGAGED CHATTELS AND APPELLANTS WERE THEREFORE IN LAWFUL POSSESSION THEREOF SINCE DECEMBER, 1954.

Statement of the Case.

For the convenience of the court, the undisputed facts epitomized in the Referee's memorandum decision are briefly restated. In sum and substance they are as follows:

The involuntary bankruptcy was initiated on February 23, 1955 [R. p. 33] which was followed by an adjudication on March 16, 1955 [R. p. 7].

Appellants (referred to in the record as the Miller partnership or family) had extensive business, commercial and financial interests, and operated a manufacturing business under the firm name of Miller Engineering Company. On June 1, 1954, the partnership sold its manufacturing business to the bankrupt for \$200,000.00; the same included its physical assets and the right to use its business name. As part payment the bankrupt gave the Miller partnership its promissory note for \$189,000.00, payable in installments and secured by the instant purchase price chattel mortgage on the physical assets involved in the sale. All the papers evidencing the sale were executed and delivered on June 1, 1954 [R. p. 33].

The papers were thereupon turned over by the partnership to its trusted employee who had been in its employ for some seven years and whose duty was, among other things, to attend to the recording of such papers as were required to be recorded [R. p. 33].

On or about August 2, 1954, and on the eve of an anticipated audit of the books of appellants' enterprise, appellants' trusted employee absconded and the auditors then found that he had failed to record the chattel mortgage. *Thereupon the chattel mortgage was recorded without any delay.* It was recorded on August 19, 1954,

which date was more than four months preceding the filing of the involuntary bankruptcy petition [R. p. 34].

On or about December 21, 1954, and prior to the initiation of the bankruptcy proceeding appellants took possession of such of the mortgaged chattels as they could find; appellants were authorized so to do under the express terms of the chattel mortgage, the bankrupt then being in default thereunder. *Appellants were in possession of the located repossessed mortgaged chattels at the date of the bankruptcy* [R. p. 34]; and in March, 1955, they were sold by appellants to a bona fide purchaser at the fair price of \$82,500.00 [R. p. 34].

In connection with the repossession and sale of the located mortgaged chattels appellants incurred expenses in the sum of \$14,019.32; and the net amount received by them was \$68,480.68 [R. p. 34].

The provable claims of the existing simple creditors prior to the recordation of the mortgage amounted to \$8,906.65 [Finding of the Referee, R. p. 56; and finding of the District Judge, R. p. 66].

On these undisputed facts the Referee stated in his memorandum *inter alia* (which was not gainsaid by the District Judge) as follows [R. pp. 36 and 37]:

“We have here a situation which literally shocks the conscience of the Referee and, if the position of the trustee is supported by any of the provisions of the Bankruptcy Act, it might well be argued that such provisions are beyond the constitutional authority given to congress to establish uniform laws on the subject of bankruptcy throughout the United States (Constitution of the U. S., Article 1, section 8, clause 4; in re Philibosian, 1937, D. C. N. D. Georgia, 19 Fed. Supp. 787, 789).

“It will be admitted that in bankruptcy legislation Congress has power (1) to provide for equality among creditors by striking down preferences (sections 60 and 67(a) of the Bankruptcy Act); (2) to provide for the recovery of property fraudulently transferred (sections 67(d) and 70(a) 4 of said Act); and (3) to provide for the exercise of rights held at [56] bankruptcy by all or some of the creditors (sections 70(c) and 70(e) of said Act. *But the framers of the Constitution never intended that Congress should have the power to use a Bankruptcy Court as an instrumentality to plunder the strong boxes of unoffending folks and then to distribute the spoils to persons having neither legal nor moral right thereto, and it is our opinion that Congress has never attempted to do any such thing and that there is nothing in the Bankruptcy Act which supports the demands here made by the trustee against the Miller partnership, except as to the credit extended prior to the recordation of the mortgage here in question.*” (Italics ours.)

At Record pages 41 and 42, the Referee further stated:

“It is clear that at the date of this bankruptcy the aforesaid creditors who, without actual notice of the Miller [59] mortgage, extended credit to the bankrupt prior to the recordation of such mortgage, had the right to assert that it was void as to them to the extent of the credit actually extended by them *prior to such recordation*, and it is equally clear that such right passed to the trustee in this case. However, the mortgage was not void as against such creditors as to credit extended by them if any such credit was extended *subsequent to the recordation*. Hence, the mortgage was not “voidable” by any of such creditors. Notwithstanding their rights, it remained in full force and effect as to all creditors who extended

credit after it was recorded. It simply was void as to credit extended prior to the recordation. (10 Cal. Jur. (2) 308; *Wolpert v. Crompton*, 1931, 213 Cal. 474; *Bank of America v. Sampsell*, 1940, C. A. 9, 114 Fed. (2) 211.)” (Italics ours.)

Formal Findings of the Referee.

In his formal findings the Referee made these supplemental findings:

1. That due to the neglect of appellants’ trusted (but dishonest) employee the purchase money chattel mortgage was recorded on August 19, 1954, a delay of 79 days [R. p. 55].

2. That the repossessed chattels were sold by appellants to a bona fide purchaser, and the purchase price represented the true value thereof [R. p. 56].

3. That in December, 1954 (when the chattels were repossessed by the appellants) the bankrupt was insolvent, and *at that time* appellants had knowledge of the bankrupt’s insolvency [R. p. 56].

The Referee did not find that the bankrupt was insolvent *at the time of the recordation of the chattel mortgage* on August 19, 1954.

Order of the District Judge.

After adopting and approving the formal factual findings of the Referee, the District Judge made these conclusions of law:

1. That under Section 70(e) of the Bankruptcy Act the chattel mortgage was void in its entirety against all of the creditors, including those who came into being after the recordation of the mortgage on August 19, 1954.

2. That the trustee was entitled to a *personal money judgment* against appellants in the sum of \$82,500.00; same being the purchase price of the chattels received by appellants upon the sale thereof and representing its fair value. The judgment carried interest; and appellants were entitled to a credit for their expenses incident to their repossession of the chattels pursuant to the terms of the mortgage and their subsequent sale thereof [R. p. 67, Conclusion of Law IV].

3. That the case should be remanded to the Referee for a determination of the expenses incurred by appellants in connection with their repossession and sale of the mortgaged chattels [R. p. 68, Finding V].¹

4. That under Section 72(g) of the Bankruptcy Act appellants were required to pay to the trustee the amount of the judgment and interest within 30 days; and that upon their payment thereof within the 30 days, appellants were granted the right to file a supplemental claim for the amount thus paid to the Trustee [R. p. 68, Finding VII].

¹The memorandum decision of the Referee indicates that the statement of appellants that their expenses were in the sum of \$14,019.32 was not contradicted by the trustee and its verity was not called into question by the Referee [R. p. 34, bottom paragraph].

ARGUMENT.

As noted in the forepart of this brief under the heading "Questions Presented for Decision" the questions posed by this appeal are solely questions of law.

We wish to preface the discussion of these legal questions by a restatement of the rule that court opinions do not rest on generalities and abstract principles having no relation to the factual situation presented by the record. It is well established that court opinions must be read in the light of the precise legal problems before the court in their application to the *factual record*.

We believe the best answer to the mistaken legal view of Judge Harrison that appellants' purchase price chattel mortgage was void *in toto*, is supplied by the learned and experienced Referee in his graphic and illuminating memorandum decision, wherein the underlying philosophy of the Bankruptcy law is comprehensively discussed.

Additionally, we wish to point to the following well established legal principles governing interpretation of statutes:

In *Rupley v. Johnson*, 120 Cal. App. 2d 548 at 553, the Court said:

"The rule is well established that all of the statutory provisions in all of the codes must be read together and harmonized if possible.

In re Porterfield, 28 Cal. 2d 91, at page 100 (168 P. 2d 706, 167 A. L. R. 675), the Court declared:

" 'It is a well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute. (Citing cases.)' "

Statutes should be read as a whole to determine the legislative intent.

People v. Trieber, 28 Cal. 2d 657, 663, 171 P. 2d 1;

People v. Moroney, 24 Cal. 2d 638, 642, 150 P. 2d 888.

Where a statute is susceptible of two constructions, the one of which leads to the more reasonable result will be followed.

Metropolitan Water Dist. v. Adams, 32 Cal. 2d 620, 630, 197 P. 2d 543.

Where the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.

Warner v. Kenny, 27 Cal. 2d 627, 629, 165 P. 2d 889;

Gage v. Jordan, 23 Cal. 2d 794, 799, 800, 147 P. 2d 387.

We respectfully submit that Section 60 of the Bankruptcy Act (providing for perfection of liens in compliance with the state law) is *in pari materia* with Sections 57g and 70 of the Bankruptcy Act; they all must be read together and harmonized with the other related sections of the Bankruptcy Act; they blend into each other, and constitute but a single statute to determine the legislative intent implicit in the philosophy of the Bankruptcy Act construed as a whole.

Our argument, in support of the major contentions set forth in our Statement of Points relied on, is presented in the following order:

I.

The Validity of the Instant Purchase Money Mortgage Is Determinable Under the Laws of the State of California.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82

L. Ed. 787, 114 A. L. R. 1487, 58 S. Ct. 817;

Bank of California v. Sampsell, 114 F. 2d 211;

In re Lustron Corporation, 184 F. 2d 789, 794;

In re Patterson, 139 Fed. Supp. 830;

In re Higgs, 126 Fed. Supp. 16.

In *Mortgan v. Commissioner*, 309 U. S. 78, the Supreme Court declared that legal interests and rights in property are created by the State law.

See also:

Helvering v. United States, 317 U. S. 54.

In *United States v. Nathanson*, 60 Fed. Supp. 193, the government sought to enforce collection of taxes assessed against the defendant from rents of property owned by the defendant and his wife by the entirety. Under the Michigan law the rents belonged to the husband; but they could not be reached by his creditors. It was the government's claim that the rents should be nonetheless seized by the government under the federal law. The government's contention was not sustained by the court, the court ruling that the Michigan law determined the property rights of the defendant.

II.

Under the California State Law a Mortgage Is a Contract Vesting in the Mortgagee a Property Interest.

In *Estate of McLaughlin*, 97 Cal. App. 485, the Court said at page 489:

“ . . . While in California it is true that a mortgage is not regarded as a conveyance to the mortgagee of any actual title to the real property (17 Cal. Jur. 714, sec. 19), yet it does create *an interest in the property* to the extent of the attachment of a lien to secure the enforcement of the obligation for the payment of which it is executed. . . .” (Italics ours.)

The primary purpose of a chattel mortgage is *to transfer title* of personalty to another as security for payment of money or performance of contract or other obligation.

Bank of California v. McCoy, 23 Cal. App. 2d 192, 195, 72 P. 2d 923.

In addition to their rights as prior owners, it follows that appellants acquired *a property interest* in the mortgaged chattels on the date of its execution and delivery on June 1, 1954 (*about eight months preceding bankruptcy*); they were entitled to the repossession thereof in December, 1954, the bankrupt then being in default; and they were in lawful possession thereof when bankruptcy was initiated in February, 1955.

We point out *infra* that appellants could not be deprived of their property interest in the mortgaged chattels under the due process clause of the Fifth Amendment to the United States Constitution either by Congress, or the Judiciary, unless their power is asserted in conformity with the requirements of due process.

III.

Under the California Law Creditors Coming Into Existence After the Recordation of a Chattel Mortgage Cannot Attack Its Validity on the Basis of Its Prior Late Recordation.

The law covering the California law on the legal effect of a delayed recordation against creditors is summed up in 10 Cal. Jur. 2d, Paragraph 28 at page 308.

The code section governing recordation of chattel mortgages is Civil Code Section 2957, the relevant part of which is set forth in the Appendix. This code section does not specify any time within which a chattel mortgage must be recorded; and as far as the parties to the mortgage are concerned, recording is not necessary to its validity under Civil Code Section 2973, the text of which is set forth in the Appendix.

But the decisions construing Civil Code Section 2957 establish the law that immediate recordation is essential to the protection of creditors of the mortgagor; and if the recordation of the mortgage is withheld *beyond a reasonable time*, the mortgage is void as against the mortgagor's existing creditors.

However, the precise legal question on the present record concerns the legal effect of a delayed recordation only as against creditors who came into existence *after the recordation of the mortgage*.

We respectfully contend that the following California decisions sustain our contention that creditors coming into existence *after the recordation of the mortgage* are not in a legal position to attack the validity thereof on the basis of its delayed recordation occurring before the existence of such creditors.

In *United Bank v. Powers*, 89 Cal. App. 690, the Court said at page 694 and 695 as follows:

“ . . . As to the third assignment of error, the plaintiff in this action asks, if the court is at all in doubt as to the law involved, to be permitted, under section 956a of the Code of Civil Procedure (Stats. 1927, p. 583), to make proof that the chattel mortgage executed by Gonsalves to the plaintiff though bearing date of February 2, 1922, was in truth and in fact executed on the seventeenth day of February, 1922. We think the granting of this request, under the circumstances disclosed by the record in this action, unnecessary. Our attention has not been called to anything in the transcript, nor have we been able to discover any testimony therein indicating that the appellant in this action is in a position to take advantage of the lapse of time between the date of plaintiff's mortgage and the date of its recordation, assuming, for the purpose of this decision, that the number of days so indicated actually intervened between its execution and recordation, for the simple reason that the record does not show that the appellant parted with any rights, acquired any rights, had any business transactions with the mortgagor Gonsalves, or became a creditor of said Gonsalves during such period of time. The law is well established in this state that in such circumstances the appellant is unharmed and has nothing of which to complain. . . .”

In *Schwartzler v. Lemas*, 11 Cal. App. 2d 442, 53 P. 2d 1039, the Court said at page 449 as follows:

“ . . . On behalf of all of the appellants it is contended that the second mortgage was void for the reason that a number of weeks intervened between the execution and the recordation thereof. The cases cited, however, do not support the contention. It clearly appears in the cases of *Williams v.*

Belling, 76 Cal. App. 610 (245 Pac. 455); *Wolpert v. Gripton*, 213 Cal. 474 (2 Pac. (2d) 7676); *Noyes v. Bank of Italy*, 206 Cal. 266 (274 Pac. 68), and *United Bank & Trust Co. v. Powers*, 89 Cal. App. 690 (265 Pac. 403), that unless the party contesting the validity of the chattel mortgage appeared with some rights or became a creditor of the mortgagor *during the interval between execution and recordation*, such party is in no position to complain . . .” (Italics ours.)

In *Swift v. Higgins*, 72 F. 2d 791 (9th Cir.), Judge Wilbur declared that under the California law a chattel mortgage is void as against the general creditors of the bankrupt who were in existence *before recordation*, if the mortgage was not recorded within a reasonable time; and that a trustee in bankruptcy of the general creditors, whose claims arose *between the execution and belated recordation* may assert its invalidity *as to such creditors*.

In *Bank of California v. Sampsell* (9th Cir.), 114 F. 2d 211, this court declared in the opinion written by Judge Healy that the California chattel mortgage recording statute (Civ. Code, Sec. 2957) is in *pari materia* with Civil Code, Section 3440 and that a chattel mortgage is valid as against creditors who became such subsequent to recording. At page 213 of the opinion this court states:

“ . . . In effect, it would appear that the state courts have construed the word ‘unless’, as used in §2957, as the equivalent of ‘until’, since a chattel mortgage, although not promptly recorded, is good *as against creditors who become such subsequent to recording*. . . .” (Italics ours.)

Clearly, the instant chattel mortgage was valid under the California law as against the creditors who came into

being after its recordation. Furthermore, as above noted, appellants' chattel mortgage was recorded more than four months prior to the filing of the involuntary bankruptcy petition.

In this connection, it is not out of place to cite at this time the recent case *In re Consorto Construction Co., Inc.*, 212 F. 2d 676, which, like the case at bar, involved the validity of a chattel mortgage as against creditors who came into existence after recordation.

At page 679 Judge Hastie speaking for the Third Circuit said at page 679 as follows:

“ . . . But the same result can be obtained merely by re-executing the old unrecorded mortgage and recording this ‘new’ instrument at once. It seems worthless formalism to require such re-execution of the old instrument as a basis for effective recordation. We think that a chattel mortgage while unrecorded can be fairly recognized as having a potential like a pledge, originally ineffective for failure to deliver possession. In the latter situation, a subsequent delivery will generally perfect the pledge except as to bona fide purchasers or creditors who have acquired liens prior thereto. . . .” (Italics ours.)

“ . . . Here the chattel mortgagee obtained a lien August 3, the date of recording. Anyone subsequently obtaining an interest in or claim against the property was subordinated to that lien. Under Section 70, sub. c the trustee's position is that of such a subsequent lienor, ‘holding a lien * * * by legal or equitable proceedings’ as of the date of bankruptcy, a time more than four months after Equity perfected its mortgage lien. . . .”

It seems that the last cited case presents a realistic and logical approach to the solution of this problem.

IV.

Furthermore Appellants' Purchase Price Mortgage Is Valid Against All Creditors Whether Existing Prior or Subsequent to Its Recordation for These Additional Reasons:

- A. Civil Code, Section 2957, Requiring Recordation of Ordinary Chattel Mortgages, Does Not Apply to Purchase Price Mortgages.
- B. Under the Undisputed Facts the Delay of Recordation Was Excusable.

A.

We believe ground A *supra* finds support in the well reasoned opinion of Judge Yankwich in the *Mercury Engineering* case (60 Fed. Supp. 376) quoted from *in extenso* in the appendix.

The *Mercury* case *supra*, like the case at bar, involved a purchase price mortgage. While the precise legal point in the *Mercury* case centered on the applicability of Civil Code, Section 3440, the reasoning of Judge Yankwich, therein, is equally persuasive on the applicability of Civil Code, Section 2957.

As declared by Judge Healy in the *Bank of America* case *supra* (114 F. 2d 211) the California general recording mortgage statute (Civ. Code, Sec. 2957) is in *pari materia* with Civil Code, Section 3440. (See also *Swift* case *supra*, 72 F. 2d 791.)

Clearly, the objectives sought to be accomplished under Civil Code, Section 3440 is identical with the objectives sought to be accomplished under Civil Code, Section 2957. The underlying philosophy is the same, namely: to protect creditors against a sale or incumbrance of assets which in the statutory sense are deemed fraudulent

as a matter of law, though the elements of actual or constructive fraud are lacking.

It is inconceivable that it was the intent of the legislature (in the words of Judge Yankwich) "to penalize a seller of a going business for supplying to the buyer the very means of carrying on a trade" and thereby to unjustly enrich the creditors at the expense of the rightful owner of the property.

It is illogical to assume that it was the intent of the legislature to bring about such an inequitable and horrendous result, which is shocking and unconscionable legally and morally.

As it was well stated by the learned Referee [R. pp. 36-37]:

" . . . We have here a situation which literally shocks the conscience of the Referee and, if the position of the trustee is supported by any of the provisions of the Bankruptcy Act, it might well be argued that such provisions are beyond the constitutional authority given to congress to establish uniform laws on the subject of bankruptcy throughout the United States (Constitution of the U. S., Article 1, section 8, clause 4; *In re Philibosian*, 1937, D. C. N. D. Georgia, 19 Fed. Supp. 787, 789)."

We will not belabor the discussion of the trustee's inequitable position any further, except to observe that the trustee's such position does not comport with the objectives implicit in the Bankruptcy Act which should be construed as a whole, and not in isolated sections.

B.

Moreover, under the undisputed facts the delay of the recordation was excusable. It was not caused by the neglect of the appellants; but it was caused solely by the dishonesty of their trusted employee.

What may be considered a reasonable time within which to record a chattel mortgage varies with the facts and circumstances of the case.

It requires no argument that appellants should not be held responsible for the acts of their agent who was bound to act faithfully and loyally.

It is well settled, as stated in 2 Cal. Jur. 2d at page 772 that:

“ . . . As a matter of law, the relationship of principal and agent binds the agent to the utmost good faith in his dealings with his principal, not only in form, but also in substance. This standard requires a high degree of honesty, loyalty, and integrity, and the most faithful service. The animating principle of the proposition is that no one should be permitted to enjoy the fruits of an advantage taken of a fiduciary relationship, whose dominant characteristic is the confidence reposed by one in another. The act of an agent within the scope of his authority of an agent is so fraught with responsibility and grave concern for his principal that it proceeds out of the highest considerations of confidence, which, the principles of equity demand, must be preserved to the utmost in transactions involving the exercise of such authority. . . .”

It is also well established that a principal cannot be held responsible to third parties for the negligence of his agents.

Tyson v. Romey, 88 Cal. App. 2d 752, 199 P. 2d 721.

We respectfully contend that the delay of the recordation of appellants' purchase price chattel mortgage (assuming that such was required under Civ. Code, Sec. 2957) was justified under the undisputed facts in this record.

It follows that appellants' chattel mortgage was valid against all of the creditors for all and each of the foregoing reasons.

V.

Appellants' Chattel Mortgage Is Valid as Against the Creditors Coming Into Existence After Its Recordation.

We respectfully contend that the contrary ruling of the District Judge is erroneous. We believe the memorandum decision of the learned Referee Brink is a conclusive answer to the legal weakness of the position of Judge Harrison. It is our considered judgment that the precise legal points *as applied to the facts on the present record* are clearly and explicitly analyzed in the lucid opinion of the Referee. They cannot be successfully assailed; and to save duplication we adopt the opinion of the Referee subject to a few additions and modifications noted below.

We wish to stress and restate these additional points:

1. Appellants' *substantive property rights* in the mortgaged chattels are determinable by the laws of the State of California; and the Bankruptcy Act prescribes only *the procedural means* for an equal pro-rata distribution of the assets of the bankruptcy estate among creditors of the same class, whose legal and equitable rights to such distribution must be weighed and measured by *the substantive law of the State of California*.

2. Under the applicable laws of the State of California appellants possessed a contractual property right and interest in the mortgaged chattels as against the bankrupt's creditors who became such after the recordation of the mortgage; and neither Congress nor the judiciary, had the constitutional power to wipe out or water down appellants' such contractual property rights under the due process clause of the Fifth Amendment to the United States Constitution.

3. Furthermore, as pointed out in the forepart of this brief appellants' chattel mortgage was valid in its entirety *against all of the creditors* for the reasons specified in heading IV *supra*, at pages 19-22.

4. As well stated by the Referee in his memorandum opinion [R. p. 37]:

" . . . But the framers of the Constitution never intended that Congress should have the power to use a Bankruptcy Court as an instrumentality to plunder the strong boxes of unoffending folks and then to distribute the spoils to persons having neither legal nor moral right thereto, and it is our opinion that

Congress has never attempted to do any such thing and that there is nothing in the Bankruptcy Act which supports the demands here made by the trustee against the Miller partnership, except as to the credit extended prior to the recordation of the mortgage here in question. . . .”

We are in full agreement with the Referee that the opinion written by Mr. Justice Holmes in the *Moore* case (281 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133) does not cover the precise legal points presented on the factual record herein. *Nor does it discuss the rights of a mortgagee under a purchase price mortgage.* Moreover, the precise constitutional question whether Congress had the constitutional power to deprive a mortgagee of his property rights was neither discussed, nor adjudicated in the *Moore* case.

Assuming, however, that the *Moore* case *supra* (on which Judge Harrison relied) may be considered as an authority as applied to the present case, we respectfully point out that the position taken by Judge Harrison raises a grave constitutional question which this court is called upon to resolve on the present factual record.

As stated by Mr. Justice Black in his dissenting opinion in the recent case of *United States v. Green*, reported in Volume 78 of the Supreme Court Reporter No. 11 at page 649 (with which the majority of the court was not in disagreement):

“. . . Ordinarily it is sound policy to adhere to prior decisions but this practice has quite properly never been a blind inflexible rule. Courts are not

omniscient. Like every other human agency, they too can profit from trial and error, from experience and reflection. As others have demonstrated, the principle commonly referred to as *stare decisis* has never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this Court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated reaffirmation. See e.g., *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; *Graves v. People of State of New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927; *Nye v. United States*, 313 U. S. 33, 61 S. Ct. 810, 85 L. Ed. 1172. Indeed, the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents; otherwise its mistakes in interpreting the Constitution are extremely difficult to alleviate and needlessly so. See *Burnet v. Coronado Oil & Gas Co.*, 385 U. S. 393, 405, 52 S. Ct. 443, 446, 76 L. Ed. 815 (Brandeis, J., dissenting; Douglas, *Stare Decisis*, 49 Col. L. Rev. 735). . . .”

We respectfully contend that the order of the District Judge reversing the order of the Referee was erroneous.

VI.

There Is No Basis to Justify a Personal Money Judgment Against the Appellants and at the Same Time to Deprive Them of Their Property Right and Interest in the Mortgaged Chattels.

On this issue it would be helpful to restate the following:

1. The chattel mortgage was executed and delivered by the bankrupt to appellants on June 1, 1954. At this time the bankrupt was solvent. Therefore, the chattel mortgage (executed about eight months preceding bankruptcy) *was valid against the whole world.*

2. Under the express provisions of the chattel mortgage contract appellants were authorized to enforce their chattel mortgage either by foreclosure or by repossessing the mortgaged chattels (10 Cal. Jur. 2d, Par. 76, at p. 376). It is admitted that the bankrupt was in default in December, 1954. Therefore, appellant had the legal right to take possession of the located chattels in December, 1954, under the express provisions of *their chattel mortgage contract and under the laws of the State of California.*

3. Appellants were in lawful physical possession of the located chattels on date of bankruptcy; and no demand for the repossession thereof has been made upon them prior to bankruptcy.

We respectfully contend that for all and each of the reasons stated in this brief appellants were not guilty of conversion of their own property; and that a personal money judgment against them cannot be sustained under the Bankruptcy Act *in any amount.*

In the case of *Industrial Finance Corporation v. Capplemann*, 284 Fed. 8 at 11, the Court said:

“When a state recording statute, as construed by the state court, only provides for protection against unrecorded instruments of ‘lien creditors’ or ‘creditors who have fastened a lien on the property’ or ‘creditors armed with judicial process,’ or the like, it has been held that the trustee cannot recover the property when the holder of an unrecorded mortgage or other instrument requiring record *acquires possession before the filing of the petition in bankruptcy*. This holding is on the express ground that the rights of no creditors had attached to any of the property until the petition was filed; that the trustee did not until then acquire the right of a lien creditor, and therefore *could not recover property which had bona fide passed from the possession and ownership of the bankrupt before the petition was filed*. *Hart v. Emmerson-Brantingham Co.* (D. C.), 203 Fed. 60.” (Italics ours.)

See also *Wolfert v. Gripton*, 213 Cal. 474 at 480, paragraph No. 2, where the Court says:

“Our law provides that a mortgage of personal property is void as against creditors of the mortgagor unless it is recorded in the office of the county recorder of the county in which the mortgagor resides, if the mortgagor be a resident of this state, and in the county in which the property mortgaged is situate. (Civ. Code, secs. 2957, 2959.) However, since an unrecorded chattel mortgage is good as between the parties thereto, *a mere general creditor* of the mortgagor is not in a position to attack its validity. (*Loosemore v. Baker*, 175 Cal. 420, 422 (116 Pac. 26); *Lemon v. Wolff*, 121 Cal. 272, 275 53 Pac. 810.) Only a creditor who has acquired a

lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing seizure of the property, can question its compliance with the formalities prescribed by the code.” (Italics ours.)

In the case of *Roder v. Boyd*, 252 F. 2d 585 at 586, the Court said (citing numerous cases in support thereof):

“A Court of bankruptcy is a court of equity, exercising equitable powers of broad sweep. And, within the statutory scheme, the Court may exert such powers in full vigor with respect to the allowance, rejection or subordination of claims. It is empowered to ‘sift the circumstances surrounding any claim to see that injustice and unfairness is not done in the administration of the bankruptcy estate.’ ”

Conclusion.

The order of the District Judge indicates that he gave no consideration to the legal points discussed in the memorandum decision of the Referee, which as pointed out in the forepart of this brief covered the precise legal points presented by the factual record herein.

The order of the District Judge further indicates that he gave no consideration to the all important point that the purchase price mortgage was valid against all of the creditors for the reasons and on the grounds discussed under heading IV of this brief at pages 19-22.

Nor did Judge Harrison consider the California State law discussed under heading III of this brief at pages 15-18.

The order of the District Judge further indicates that the basis of his adverse ruling against appellants rested

solely on Section 70(e) of the Bankruptcy Act considered in isolation from the other related sections of the Bankruptcy Act.

We respectfully urge that the order of the District Judge should be vacated, and that the order of the Referee should be modified by deleting therefrom Conclusion of law numbered VI at page 58 of the record; and also No. 2 of the order at page 59 of the record.

Respectfully submitted,

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APPENDIX.

Excerpts from *In re Mercury Engineering Co*, 68 Fed. Supp. 376:

At page 380:

"The claimant here, Arthur E. Barili, for a long time prior to June 26, 1943, owned and operated a machine shop at 722 North Broadway, Los Angeles, California. On that day he sold it as a going concern to Charles B. Taylor, who was acting not for himself but as Trustee for Mercury Engineering Company Incorporated, a corporation in the process of formation, for a total sum of \$16,000. Barili received \$5,000 in cash and the balance was to be evidenced by a promissory note in the sum of \$11,000 secured by a chattel mortgage upon the business, machinery and equipment sold. The chattel mortgage is undated, but was acknowledged on June 30th, and delivered to Barili. The company was formed on July 6th and thereafter the machine shop and business were transferred to the new corporation by Taylor, the Trustee. The corporation did not complete its organization and start business until the week ending Saturday, July 4th. During the week, Barili remained at the place of business. The following Monday, July 26th, the chattel mortgage was recorded."

* * * * *

At page 378:

". . . the chattel mortgage is first challenged because of failure to comply with Section 3440 of the California Civil Code . . ."

At page 379:

* * * * *

“We need not go into a detailed discussion of this section. It has its duplicate in almost every state in the Union, including the State of New York. California Courts do not seem to have been called upon to determine whether its provisions apply *to a purchase price chattel mortgage*. But the referee rightly concluded that it did not so apply upon no less an authority than the Circuit Court of Appeals for the Second Circuit, whose opinions upon a matter of this character interpreting a New York statute of identical import with ours command not only respect, but require following when no contrary ruling in our own Circuit appears. *This is especially the case when the decision accords with the very philosophy which lies behind the enactment. Its object is to protect the creditors against a surreptitious sale or incumbrance of the chief assets or equipment of a trader. But when the incumbrance is to secure the moneys which represented the price of these assets, the reason for the requirement disappears. For to hold that the seller who, instead of receiving cash acquires a mortgage on property which he transfers to a buyer, must subordinate his rights to this buyer’s other creditors, is to penalize him for supplying to the buyer the very means of carrying on a trade. It would mean to subsidize the existing creditor who may have extended credit on the basis of ownership of other assets at the expense of the man who furnishes the stock in trade or equipment to carry on a business. When we require notice before sale of stock in trade, we do so in order that the basis on which the prior credit had been secured be not dissipated without notice. But when the basis did not exist, but came into being through the very sale and incumbrance, the very foundation for the*

requirement is gone. Nor is there merit to the contention that the chattel mortgage was invalid because of failure to comply with the requirement of Section 2957 of the Civil Code of California, which calls for recordation in the county where the mortgagor resides and the county where the property is located. Non-compliance with the section either by failure to record or long delay in recording, renders the chattel mortgage invalid as against prior or subsequent creditors. Because the requirement as to recording takes the place of the immediate delivery and change of possession required in other cases, the Courts have held that this requirement is satisfied only if the recording is done promptly, unless such recording is impractical or the circumstances of the case warrant delay. In giving effect to these rulings, the Referee found that the short delay in recording the chattel mortgage was justified. The conclusion is warranted by the facts.” (Italics supplied.)

* * * * *

Civil Code, Section 2957, reads in relevant part as follows:

“A mortgage of personal property or crops is void as against creditors of the mortgagor and subsequent purchasers and encumbrances of the property in good faith and for value, unless . . .

“The mortgage, if of animate personal property other than crops growing or to be grown, is recorded in the office of the recorder of the county where the mortgagor resides at the time the mortgage is executed, or in case the mortgagor is a nonresident of this State, in the office of the recorder of the county where the property mortgaged is located at the time the mortgage is executed.”

* * * * *

Civil Code, Section 2973, reads as follows:

“Mortgages of personal property, other than mentioned in section twenty-nine hundred and fifty-five, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs, legatees, and personal representatives, and persons who, before parting with value, have actual notice thereof.”

No. 15781

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN
MILLER, and ELIAS MILLER and PAUL MILLER, as
Executors of the Estate of George Miller, Deceased,
Appellants,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate
of DELCON CORPORATION, Bankrupt,
Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE.

QUITTNER, STUTMAN & TREISTER,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellee.

FILE

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No. 15781

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN
MILLER, and ELIAS MILLER and PAUL MILLER, as
Executors of the Estate of George Miller, Deceased,
Appellants,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate
of DELCON CORPORATION, Bankrupt,
Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE.

Jurisdiction.

The Court has jurisdiction of this appeal under Section 24 of the Bankruptcy Act (11 U. S. C., Sec. 47.) While the order appealed from is still interlocutory,¹ nevertheless the questions here presented arise out of a "proceeding in bankruptcy," *i.e.*, an objection filed by Appellee-Trustee in Bankruptcy to Appellants' claim. Section 24 of the Bankruptcy Act confers appellate jurisdiction over interlocutory orders in such cases. See, *e.g.*, *In re Greenstreet, Inc.*, 209 F. 2d 660 (C. A. 7, 1954).

¹In the order appealed from, the District Judge remanded the case to the Referee in Bankruptcy for the sole purpose of determining whether Appellants were entitled to certain credits against the judgment in favor of Appellee. [Transcript of Record, pp. 68-69.]

Statement of the Case.

Delcon Corporation was adjudicated a bankrupt on March 16, 1955 [Tr. p. 7]² upon an involuntary petition filed February 23, 1955. [Tr. pp. 3-5.] Following a general reference of the proceedings to Referee in Bankruptcy Benno M. Brink [Tr. p. 6], Appellee was appointed Trustee on April 25, 1955. [Tr. pp. 7-8.]

On October 24, 1955, Appellants filed their proof of claim against the bankrupt estate in the sum of \$141,742.50, the claim being assigned number 68 on the Referee's docket.³ The claim, for the most part, represented the balance owing on the purchase price of a machine shop business sold by the Appellants to the bankrupt in 1954. In calculating the amount still owing, a credit was allowed for the net sum realized by Appellants from the sale of certain machinery and equipment repossessed by them under a chattel mortgage which had partially secured the purchase price. [Tr. pp. 8-16.]

Appellee objected to claim number 68 on the ground that the chattel mortgage was invalid in bankruptcy, that the repossession of the machinery and equipment therefore constituted a voidable transfer, and that accordingly, under Section 57g of the Bankruptcy Act, 11 U. S. C. Sec. 93g, Appellants' claim was not entitled to allowance until the subject matter of the transfer was surrendered to the Trustee. Additionally, Appellee sought affirmative relief against Appellants by way of counterclaim, on three theories: First, that the chattel mortgage, which had

²All citations to the record refer to the printed Transcript of Record on file in the Court of Appeals.

³The claim was filed in the name of Appellant Paul Miller. But it was stipulated that in filing the claim in this manner, Paul Miller acted as agent for all of the Appellants. [See Tr. p. 32.]

been tardily recorded, was invalid as against a trustee in bankruptcy under Section 2957 of the California Civil Code and Section 70e of the Bankruptcy Act, 11 U. S. C. Sec. 110e, and that Appellee accordingly was entitled to the fair value of the property repossessed, to-wit, \$82,500.00; second, that the mortgage also was invalid as against the Trustee under Section 70c of the Bankruptcy Act, 11 U. S. C. Sec. 110c; and third, that by virtue of the same facts, the repossession of the machinery and equipment constituted a voidable preference under Section 60 of the Act, 11 U. S. C. Sec. 96. [Tr. pp. 16-20.]

After trial of the issues thus raised by Appellee's Objection to Claim and Counterclaims, the Referee found and ruled on May 6, 1957, that under the applicable California statute, Civil Code Section 2957, the delay in recordation rendered the chattel mortgage void only as to creditors who held claims arising prior to recordation, and that Appellee was limited in his recovery under Section 70e of the Bankruptcy Act to the amount of the claims of those creditors who, outside of bankruptcy, could have invalidated the mortgage. Since Appellee had established that provable claims totaling \$8,906.95 arose prior to recordation, judgment was entered in this sum against Appellants. The Referee further held as a matter of law that Appellee had no cause of action under Sections 70c and 60 of the Bankruptcy Act. Appellants' claim number 68 was disallowed until such time as they paid to the trustee the judgment above referred to. [Tr. pp. 53-59.]

Appellee filed a timely petition to review the Referee's judgment, contending that the Trustee's recovery should have been the sum of \$82,500.00. [Tr. pp. 60-62.] Ap-

pellants did not seek a review; on the contrary, they urged the correctness of the Referee's holding.

On July 30, 1957, United States District Judge Ben Harrison reversed the Referee's decision. The Judge concluded that the mortgage was invalid in its entirety as against the Trustee under Section 70e of the Act; that under this section, as interpreted in *Moore v. Bay*, 284 U. S. 4, Appellee was not limited in his recovery to the amount of the creditors' claims on which he relied in assailing the mortgage. Judgment was directed to be entered for \$82,500.00, plus interest; the case was remanded to the Referee for the sole purpose of determining whether Appellants should be given a credit against the judgment for certain expenses incurred in connection with the repossession and sale of the chattel mortgaged property.⁴ [Tr. pp. 63-70.] In view of this holding, it was unnecessary for the Judge to pass upon Appellee's counterclaims under Sections 70c and 60 of the Bankruptcy Act.

On August 12, 1957, Appellants filed their Notice of Appeal from Judge Harrison's Order of July 30, 1957. [Tr. pp. 70-72.] In their "Statement of Points" on appeal, they again urged in effect that the Referee's judgment was correct and that the District Judge had erred in the order of reversal. [Tr. pp. 76-79.] This is pointed out because in Appellants' Opening Brief, they now apparently contend for the first time that both the Referee and the District Judge erred, and that Appellee is not entitled to judgment in any amount. (See, *e.g.*, Op. Br. pp. 19-22.)

⁴Appellants allegedly incurred costs and expenses of \$14,019.32 in repossessing and selling the machinery and equipment under the chattel mortgage. [See Tr. p. 34.]

Statement of Facts.

The facts involved are not in dispute, the Referee's findings being adopted *verbatim* by the District Judge: On June 1, 1954, Miller Engineering Co., a partnership composed of Appellants Paul Miller, Elias Miller, George Miller and their respective wives, sold to the bankrupt a machine shop business for \$200,000.00. As part of the purchase price, the bankrupt issued a note in favor of Miller Engineering Co., securing it with a chattel mortgage upon the machine shop's physical assets. [Tr. pp. 64-65.]

The chattel mortgage was executed by the bankrupt and delivered to a representative of Miller Engineering Co. on June 1, 1954. But due to the neglect of one of the partnership's employees, the mortgage was not recorded until 79 days later on August 19, 1954. [Tr. p. 65.]

This delay in recordation, as both the Referee in Bankruptcy and District Judge correctly concluded, rendered the chattel mortgage invalid as to creditors of the bankrupt who extended credit prior to the recordation date. [Tr. pp. 67, 57; Cal. Civ. Code Sec. 2957.] On the date of bankruptcy, there were several such creditors in existence having provable claims totaling \$8,906.95. [Tr. p. 66.]

On December 27, 1954, within the four month period preceding the bankruptcy, Miller Engineering Co. repossessed the property subject to the chattel mortgage, the bankrupt then being in default upon its obligation for which the mortgage was security. Thereafter in March 1955, subsequent to the filing of the bankruptcy petition, Miller Engineering Co. sold the repossessed

assets to a bona fide purchaser for the sum of \$82,500.00, an amount found to represent the fair value of the property. At the time of the repossession the bankrupt was insolvent within the meaning of the Bankruptcy Act, and this fact was known to Miller Engineering Co. [Tr. pp. 65-66.]

Statutes Involved.

California Civil Code, Section 2957:

"A mortgage of personal property . . . is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless

.
"4. The mortgage, if of personal property other than crops growing or to be grown or animate personal property, is recorded in the office of the recorder of the county where the property mortgaged is located at the time the mortgage is executed.
."

Bankruptcy Act, Section 70e(1), 11 U. S. C., Section 110e(1):

"A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

Bankruptcy Act, Section 70c, 11 U. S. C., Section 110c:

"The trustee, as to all property, whether or not coming into possession or control of the court, upon

which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.”

Bankruptcy Act, Section 60, 11 U. S. C., Section 96:

“(a)(1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

.

“(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.”

Issues Presented.

The only issues properly presented on this appeal are as follows:

1. When a chattel mortgage is invalid under state law as against some of the bankrupt's creditors, can the Trustee in Bankruptcy set aside and avoid the mortgage in its entirety, or is he limited in his recovery to the

amount of the claims of the creditors who could attack the mortgage outside of bankruptcy?⁵

2. Does the Federal Constitution prohibit the rule of bankruptcy law which enables a Trustee in Bankruptcy to invalidate in its entirety a chattel mortgage which is only partially invalid under state law?

Other purported issues set forth in the Opening Brief are either not actually in dispute or are not properly raised by the present record because of Appellants' failure to specify them in their "Statement of Points Relied on Appeal."

Outline of Argument.

I.

The Chattel Mortgage in Question Was Void in Its Entirety as Against the Trustee in Bankruptcy Under Section 70e of the Bankruptcy Act, and the District Judge Accordingly Was Correct in Rendering Judgment in Appellee's Favor for \$82,500.00, the Fair Value of the Property Repossessed by Appellants.

A. *The chattel mortgage, being invalid under California law as against certain of the bankrupt's creditors, was entirely void as against the Trustee in Bankruptcy under Section 70e of the Bankruptcy Act as interpreted in Moore v. Bay, 284 U. S. 4 (1931).*

⁵The District Judge held that a chattel mortgage partially voidable under state law by creditors of the bankrupt could be invalidated *in toto* by the Trustee under Section 70e of the Bankruptcy Act. The holding can also be supported in this case under Sections 70c and 60 of the Act, as will be argued hereinafter.

B. *Section 60 of the Bankruptcy Act does not affect nor modify the Trustee's power to avoid transfers under Section 70e of the Act.*

C. *Section 70e of the Bankruptcy Act, as interpreted in Moore v. Bay, is constitutional.*

II.

The Trustee's Power Under Section 70c of the Bankruptcy Act to Invalidate a Tardily Recorded Chattel Mortgage Would Also Support the Order of the District Judge.

III.

The Trustee's Power to Avoid Preferences Under Section 60 of the Bankruptcy Act Would Also Support the Order of the District Judge.

IV.

Purported Issues Referred to in Appellants' Opening Brief Which Are Not Properly Before the Court of Appeals on the Present Record.

A. *Appellants cannot raise for the first time on appeal issues which they failed to assert both before the District Judge and in their Statement of Points on Appeal.*

B. *Appellants' 79 day delay in recording the chattel mortgage was not excusable under the circumstances of this case.*

C. *A purchase money chattel mortgage is not exempted from the recordation requirement of Section 2957 of the California Civil Code.*

D. *Appellants' repossession of the chattel mortgaged property shortly before bankruptcy did not affect the Trustee's power to set aside the transfer, or recover the fair value thereof, under the avoiding sections of the Bankruptcy Act.*

ARGUMENT.

I.

The Chattel Mortgage in Question Was Void in Its Entirety as Against the Trustee in Bankruptcy Under Section 70e of the Bankruptcy Act, and the District Judge Accordingly Was Correct in Rendering Judgment in Appellee's Favor for \$82,500.00, the Fair Value of the Property Repossessed by Appellants.

- A. The Chattel Mortgage, Being Invalid Under California Law as Against Certain of the Bankrupt's Creditors, Was Entirely Void as Against the Trustee in Bankruptcy Under Section 70e of the Bankruptcy Act as Interpreted in *Moore v. Bay*, 284 U. S. 4 (1931).

Appellants' delay of 79 days in recording their chattel mortgage rendered it invalid under Section 2957 of the California Civil Code as against creditors whose claims arose prior to recordation. Both the Referee and the District Judge so found and held; indeed, the correctness of this determination was conceded by Appellants until for the first time in their Opening Brief they appear to dispute it. The controversy in the courts below merely concerned the extent of the Trustee's recovery, namely, whether judgment should be entered against Appellants for \$8,906.95, the amount of the creditors' claims arising prior to recordation, or whether the Trustee was entitled to invalidate the chattel mortgage *in toto* and recover \$82,500.00, the full value of the property subject thereto. Appellee will argue in this portion of his brief the question of the extent of the Trustee's recovery under Section 70e of the Bankruptcy Act, as interpreted in *Moore v. Bay*. Appellants' present contention that the chattel mortgage was completely valid under state law will be refuted under heading IV of this brief, *infra*.

In 1931, in *Moore v. Bay*, 284 U. S. 4, the United States Supreme Court established by unanimous opinion two fundamental principles of bankruptcy law:

First, that when under state law a transfer is voidable to any extent by a creditor of the bankrupt having a provable claim, the transfer is entirely void as to the Trustee in Bankruptcy. That is to say, the extent of the Trustee's recovery is not limited to the amount of the claims upon which he relies in attacking the transfer.

Second, that the recovery thus made by the Trustee, is to be distributed pro rata to all creditors of the bankrupt, in accordance with the distributive provisions of the Bankruptcy Act, and not only to those creditors who might have attacked the transfer outside of bankruptcy.

While the Supreme Court's decision was rendered in the characteristically brief style of Mr. Justice Holmes, analysis of the opinion of the Ninth Circuit, *In re Sassard & Kimball*, 45 F. 2d 449 (C. A. 9, 1930), which was reversed *sub nom. Moore v. Bay*, leaves no doubt that the holding established both the foregoing propositions.

The case involved a chattel mortgage which, because of a failure to record the notice required by Section 3440 of the California Civil Code, was invalid as to certain creditors of the bankrupt but valid as to others. The Trustee asserted that the mortgage in question was completely void as to him:

"It is the contention of appellant [Trustee] that, under Section 70e of the Bankruptcy Act . . ., the mortgage in question, being void as to one creditor or class of creditors, is void in toto at the suit of the trustee." (45 F. 2d at 450.)

The Court of Appeals rejected this contention, holding that the Trustee had no greater rights than the creditors who could attack the mortgage under state law:

“There is no express language in this section [70e] which specifically gives to any unsecured creditor of a bankrupt any greater rights or any secured creditor any less right than he had before adjudication in bankruptcy. The rights of a trustee in bankruptcy to ‘avoid any transfer’ are no greater than those of a creditor or particular class of creditors. It is clear, we think, that a trustee in bankruptcy is limited in his control and disposition of the estate of the bankrupt to the rights of creditors as such rights existed and could be enforced under the state law prior to the time proceedings in bankruptcy were instituted.” (45 F. 2d at 450.)

The Supreme Court reversed this decision. It therefore necessarily held that the Trustee did derive greater rights than the creditors upon whom he relied; that the Trustee’s power was to invalidate the transfer in its entirety even though the creditors whose claims were relied upon could have invalidated the transfer only in part outside of bankruptcy.

Since 1931, there has not been a single Court of Appeals or Federal District Court which has denied the rule that a transfer, voidable in part by creditors of the bankrupt, is completely void under Section 70e of the Bankruptcy Act as against the Trustee in Bankruptcy. Thus, the Second Circuit stated in *City of New York v. Rassner*, 127 F. 2d 703, 707 (C. A. 2, 1942):

“ . . . in many cases chattel mortgages are valid as against some creditors and not others; and yet ever since *Moore v. Bay*, 284 U. S. 4, 52 S. Ct. 3,

76 L. Ed. 133, 76 A. L. R. 1198, it has been considered proper to invalidate a mortgage in toto even though the only creditor entitled to invalidate has an insignificant claim, and proper to distribute the proceeds among all the creditors."

The Fourth Circuit in *Friedman v. Sterling Refrigerator Co.*, 104 F. 2d 837, 840 (C. A. 4, 1939), held:

" . . . it is held that a claim which for want of record is void as against some but not all of the creditors of the bankrupt may be avoided in toto by the trustee in bankruptcy, even though creditors generally benefit by the avoidance." (Trustee relied upon a provable claim of \$14.23 to set aside a security transaction involving more than \$500.00.)

Likewise, the Fifth Circuit has held in *Corley v. Cozart*, 115 F. 2d 119, 121 (C. A. 5, 1940):

"The bill of sale to secure debt, being admittedly invalid as against subsequent creditors without notice, was properly held to be invalid in its entirety on objection of the Trustee in Bankruptcy. A claim void against some of the creditors of a bankrupt may be avoided in its entirety by the Trustee even though creditors generally benefit by the avoidance."

General Motors Acceptance Corporation v. Collier, 106 F. 2d 584 (C. A. 6, 1939), *cert. den.* 309 U. S. 682, involved a tardily recorded chattel mortgage, which, under the applicable Michigan statute, was invalid as to creditors who extended credit in the interim between execution of the mortgage and its recordation. At page 586, the Sixth Circuit held on rehearing:

" . . . *Moore v. Bay* . . . requires a holding that the mortgages are void in their entirety regardless of the extent of interim credit."

In *American Trust Co. v. New York Credit Men's Adjust. B.*, 207 F. 2d 685, 689 (C. A. 2, 1953), the court said:

“Appellant urges that the delay [in recordation of the chattel mortgage] should not prejudice its claim as against those who became creditors after filing; but the contention is without merit. As we have recently held, *Zamore v. Goldblatt*, 2 Cir., 194 F. 2d 933, certiorari denied *Goldblatt v. Zamore*, 343 U. S. 979, 72 S. Ct. 1077, 96 L. Ed. 1370, where one creditor represented by the trustee can avoid the mortgage, so may the trustee on behalf of all. Bankruptcy Act, §70, sub. e(1), 11 U. S. C. A. §110, sub. e(1); *Moore v. Bay*, 284 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133. The . . . mortgages are therefore void.”

The Court of Appeals for the Eighth Circuit followed the same rule in *Mercantile Trust Co. v. Kahn*, 203 F. 2d 449 (C. A. 8, 1953), where the Trustee relied upon creditors with approximately \$200 of claims to invalidate *in toto* a chattel mortgage upon property having a value of about \$1700.

Accord:

Zamore v. Goldblatt, 194 F. 2d 933 (C. A. 2, 1952), *cert. den.* 343 U. S. 979;

Trailmobile, Inc. v. Wiseman, 244 F. 2d 76 (C. A. 6, 1957);

In re Tobias, 150 Fed. Supp. 288 (W. D. Mich., 1957);

In re Higgs, 126 Fed. Supp. 16 (E. D. Mich., 1954);

Deane v. Fidelity Corporation of Michigan, 82 Fed. Supp. 710 (W. D. Mich., 1949);

In re Independent Distillers of Kentucky, 34 Fed. Supp. 708 (W. D. Ky., 1940);

In re Johnson, 23 Fed. Supp. 337 (W. D. Mich., 1938);

In re Consolidated Oil Company, 140 Fed. Supp. 614 (E. D. Mich., 1956);

Tatelbaum v. Nat'l Store Etc. Co., 196 Md. 599, 78 A. 2d 228 (Ct. of App. Md., 1951).

The present state of the law is excellently summarized in 4 Collier on Bankruptcy, Par. 70.95, at pages 1533-1536:

“Since the decision in the *Bay* case, no dissenting voice has been raised by the courts. The accepted rule is that in a suit under §70e if the transfer or obligation is voidable at all, it is voidable *in toto*. Thus where a chattel mortgage, because it was not filed promptly after its execution, is void as against creditors who extended credit to the bankrupt during the interim, it is void as against the trustee in its entirety, regardless of the extent of such interim credit. . . . There can be no doubt that the Supreme Court ruled authoritatively on the matter, for the issue was squarely before the court. It has been said that the language of the decision indicates that the problems of distribution and measure of recovery were confused by the Court, and that the Court intended to rule only as to distribution. However, the demarcation between the two problems in various fact situations is not often clearly discernible. It is more probable, then, that the Court pursued a conscious course, particularly since the issue had been definitely raised. . . .

“In support of the [*Moore v. Bay*] rule of complete avoidance, it can be argued that although the

trustee's power of avoidance under §70e is predicated upon that of creditors granted by applicable state or federal law, the Bankruptcy Act itself governs the extent and distribution of recovery. In this connection attention must again be called to certain language inserted in §70e(2) by the 1938 Act:

“‘All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate.’

“Once it has been determined that a particular transfer or obligation is voidable by the trustee, it would seem that this provision compels an avoidance *in toto*, assuming, as we must, that such language was not inserted in the Act without purpose. At the very least it certainly indicates no intention of restricting or revoking the rule of *Moore v. Bay*, and thus gives the rule tacit approval. In fact, one outstanding authority has stated that the rule was called to the attention of the draftsmen of the 1938¹ Act, and was considered by them. Consequently, irrespective of possible criticism on the basis of inequity, the rule of *Moore v. Bay* must be regarded as absolutely controlling.”

Other commentators have similarly stated the *Moore v. Bay* principle.

See, *e.g.*,

- 1 Glenn, *Fraudulent Conveyances and Preferences*, (Rev. ed. 1940), pp. 567-568;

Schwartz, *Moore v. Bay: Should Its Rule be Abolished?* 29 J. Nat'l Assoc. of Referees in Bankruptcy, No. 2 (April, 1955).

The case of *In re Consorto Const. Co.*, 212 F. 2d 676 (C. A. 3, 1954), cited by Appellants (Op. Br. p. 18), is not in point. It turns on the applicable Pennsylvania law which, unlike California's statute, prevents a creditor from attacking a chattel mortgage once it has been recorded, even though the claim arose before recordation. The *Consorto* decision is discussed more fully under heading II of this Brief, *infra*.

Appellants completely miss the point when they argue that their chattel mortgage was valid under California law as against creditors coming into existence after the delayed recordation. (See, *e.g.*, Op. Br. pp. 15-18, 22-23.) The question here is whether it was valid at all as against a Trustee in Bankruptcy who, by virtue of the Bankruptcy Act, occupies a unique position.

In view of the foregoing authorities, it is clear that the District Judge correctly held Appellants' chattel mortgage void *in toto* as against Appellee under Section 70e. Since Appellants had repossessed and sold the mortgaged property to a bona fide purchaser, and could no longer return the assets in kind, it followed that Appellee was entitled to a money judgment for \$82,500.00, the fair value of the property involved. It also follows, of course, that upon payment of the judgment Appellants will have the right under Section 57n of the Bankruptcy Act, 11 U. S. C., Sec. 93n, to file a claim for the full amount then owing to them, and to share pro rata with other creditors in the dividends paid by the bankruptcy estate.

B. Section 60 of the Bankruptcy Act Does Not Affect nor Modify the Trustee's Power to Avoid Transfers Under Section 70e of the Act.

In their Statement of Points on Appeal, Appellants suggest that the Trustee's avoiding powers under Section 70e of the Bankruptcy Act, as interpreted in *Moore v. Bay*, are in some way modified and made less effective by Section 60 of the Act. [Tr. pp. 76-79.] Perhaps this contention has now been abandoned, although a passing reference is made to it in the introductory portion of the Opening Brief. (Op. Br. p. 12.)

In any event, no authority is cited to support the point, and none could be. A trustee in bankruptcy is armed with a number of powers to strike down or recover various types of liens and transfers. Thus, he can recover certain preferences under Section 60 of the Bankruptcy Act, 11 U. S. C., Sec. 96; invalidate certain judicial liens under Section 67a, 11 U. S. C., Sec. 107a, and certain statutory liens under Section 67c, 11 U. S. C., Sec. 107c; invalidate fraudulent transfers under Section 67d, 11 U. S. C., Sec. 107d; invoke all the rights and remedies of a lien creditor under Section 70c, 11 U. S. C., Sec. 110c; and set aside any transfers voidable by a creditor under state law, under Section 70e, 11 U. S. C., Sec. 110e. These avoiding powers are cumulative. So far as can be ascertained, it has never been urged until the present time, that the sections modify each other or should be read *in pari materia*.

Certainly Section 60 was part of the Bankruptcy Act when *Moore v. Bay* was decided in 1931; yet without reference to it, the Supreme Court there interpreted Section 70e. No other court in following *Moore v. Bay* has ever suggested that the holding of that case was affected by the provisions of Section 60. And the legislative history of the various amendments to Section 60 enacted since 1931 reveals nothing which would support Appellants' contention.

In short, the various avoiding powers, rather than modifying each other, are intended for different purposes, although in some instances, as in the present case, more than one of the sections will enable the Trustee to make his recovery. The leading treatise on the subject of bankruptcy states the proposition as follows:

“Another point to note is that §§60, 67a, 67d, 70c and 70e offer the trustee an arsenal of weapons. Sometimes all are ineffective; at other times only one will suffice; still another time the trustee may invoke two or more provisions, or may choose one weapon as peculiarly fitted to his task.”

3 Collier on Bankruptcy, Par. 60.01, pp. 745-746.

C. Section 70e of the Bankruptcy Act, as Interpreted in *Moore v. Bay*, Is Constitutional.

Appellants suggest that Section 70e, as construed by the Supreme Court in *Moore v. Bay*, is of doubtful constitutionality. This point, however, while mentioned in their brief, is neither argued nor spelled out, and no authority is cited in support of it. (Op. Br. pp. 24, 14, 7-8.) Apparently, the portion of the Constitution which

Appellants have in mind is the due process clause of the Fifth Amendment.

If any doubts ever existed as to Congress' authority to give a trustee in bankruptcy the *Moore v. Bay* broad measure of recovery, they were laid to rest by Chief Justice Marshall more than a century ago in *Sturges v. Crowninshield*, 4 Wheat. 120, 192 (1819), where the legislative power in the field of bankruptcy under Article I, Section 8, clause 4 of the Constitution was held to be "both unlimited and supreme."

"The United States Supreme Court, by a long line of decisions, has affirmed the power. Only in its 5—4 decision in *Ashton v. Cameron Co. Water Imp. Dist. No. 1* holding the Municipal Debt Readjustments Act (§§78-80) unconstitutional as an infringement of state sovereignty has it attempted to limit the bankruptcy power when reasonably exercised. But this decision, characterized by commentators as 'legally and economically indefensible', has been effectively overruled by *United States v. Bekins* which sustained the second Municipal Debt Readjustments Act. . . ."

1 Collier on Bankruptcy, Par. 0.02, pp. 5-6.

Another authoritative writer, Charles Warren, in his book *Bankruptcy in United States History* (1935), p. 9, quoted in Hanna and MacLachlan, *Creditors' Rights and Corporate Reorganization, Cases and Materials* (1957 ed.), p. 298, n. 5, discusses the Congressional power as follows:

"The trail [of the bankruptcy clause] is strewn with a host of unsuccessful objections based on constitutional grounds against the enactment of various

provisions, all of which are now regarded as perfectly orthodox features of a bankruptcy law. Thus, it was at first contended that, constitutionally, such a law must be confined to the lines of the English statute; next, that it could not discharge prior contracts; next, that a purely voluntary law would be non-uniform and therefore unconstitutional; next, that there could be no discharge of debts of any class except traders; next, that a bankruptcy law could not apply to corporations; next, that allowance of State exemptions of property would make a bankruptcy law non-uniform; next, that any composition was unconstitutional; next, that there could be no composition without an adjudication in bankruptcy; next, that there could be no sale of mortgaged property free from the mortgage. All these objections, so hotly and frequently asserted from period to period, were overcome either by public opinion or by the Court."

The Supreme Court, in *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 517 (1938), *reh. den.*, 305 U. S. 668, rejected a contention similar to Appellants' present constitutional argument, as follows:

"If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the States, it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state law. A familiar instance is the invalidation of transfers working a preference, though valid under state law when made."

These authorities, especially in light of Appellants' failure to press the point, compel the dismissal of the constitutional challenge as frivolous.

II.

The Trustee's Power Under Section 70c of the Bankruptcy Act to Invalidate a Tardily Recorded Chattel Mortgage Would Also Support the Order of the District Judge.

Although it was unnecessary for the District Judge to pass upon Appellee's counterclaim under Section 70c of the Bankruptcy Act, that section also would support the order here appealed from. Section 70c provides in part as follows:

"The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, *whether or not such a creditor actually exists.*" (Emphasis added.)

Constance v. Harvey, 215 F. 2d 571 (C. A. 2, 1954), cert. den. 348 U. S. 913, involved a tardily recorded chattel mortgage. Under the applicable New York statute, as under California's, creditors whose claims arose prior to recordation could levy upon the chattel mortgaged property even after recordation. (The leading case establishing the California rule is *Ruggles v. Cannedy*, 127 Cal. 290, 298-302 (1899).) On this construction of the recording law, the Second Circuit held on rehearing that since a hypothetical creditor who extended credit prior to the delayed recordation could have levied on the chattel mortgaged property at the date of bankruptcy, the Trustee obtained a lien under Section 70c on that date. This result followed under Section 70c even though the Trustee

failed to prove, and there might not even exist, an actual creditor who could obtain such a lien at the time of bankruptcy. Obviously, the Trustee's recovery under Section 70c, not being derived from rights of actual creditors, must of necessity involve a complete invalidation of the defective chattel mortgage.

Although *Constance v. Harvey* was criticized by many commentators, the Second Circuit declined to modify its holding when the same question was presented to it for decision two years later. In *Conti v. Volper*, 229 F. 2d 317, 318 (C. A. 2, 1956), the Court, in a brief *per curiam* decision, merely quoted Section 70c and then stated:

“ . . . it is difficult to see how such plain language could be disregarded.”

The Seventh Circuit in *In re Kranz Candy Co.*, 214 F. 2d 588, 591-592 (C. A. 7, 1954), independently gave Section 70c the same construction as that put upon it by the Second Circuit. And this Court cited *Constance v. Harvey* with approval in *England v. Sanderson*, 236 F. 2d 641, 643, n. 7 (C. A. 9, 1956).

No conflict exists between the holding in *Constance v. Harvey* and the decision in *In re Consorto Const. Co.*, 212 F. 2d 676 (C. A. 3, 1954), cited by Appellants. (Op. Br. p. 18.) The Pennsylvania recording statute involved in the *Consorto* case protects only creditors who actually levy on the chattel mortgaged property prior to recordation, as distinguished from the New York and California statutes which protect those extending credit prior to recordation, whether or not they obtain their liens prior thereto. Therefore, recordation having taken place in the *Consorto* case prior to bankruptcy, no hypothetical or actual creditor on that date could prevail over

the chattel mortgagee, and the Trustee accordingly could not rely on either Sections 70c or 70e. But the Third Circuit expressly distinguished the California recording statute as construed in *Ruggles v. Cannedy*, 127 Cal. 290, 298-302 (1899), indicating that a different conclusion would be required if the Pennsylvania law were similar.

Section 70c, therefore, requires a holding in the present case that the chattel mortgage was completely void as to Appellee, with the result that judgment was properly directed for the full fair value of the repossessed machinery and equipment.

III.

The Trustee's Power to Avoid Preferences Under Section 60 of the Bankruptcy Act Would Also Support the Order of the District Judge.

Appellee concedes that his argument under this heading must stand or fall on the validity of the positions taken by him in previous sections of this Brief. That is to say, the Trustee's cause of action under Section 60 of the Bankruptcy Act merely buttresses those under Sections 70e and 70c and is not independent of them.

Since, as has been demonstrated earlier, the chattel mortgage in question was void in its entirety as against the Trustee, Appellants were, in the eyes of the bankruptcy law, only unsecured or general creditors on December 27, 1954 when the repossession occurred. It is well established that a transfer of property to a creditor holding a lien voidable in bankruptcy constitutes a preference.

3 Collier on Bankruptcy, Par. 60.22, pp. 842-844, and cases there cited.

The date of repossession being within four months of bankruptcy, and the other elements of a voidable preference having been established [see Tr. p. 66], it follows that Appellee is entitled to recover the full fair value of the property repossessed under Section 60 of the Bankruptcy Act.

IV.

Purported Issues Referred to in Appellants' Opening Brief Which Are Not Properly Before the Court of Appeals on the Present Record.

A. Appellants Cannot Raise for the First Time on Appeal Issues Which They Failed to Assert Both Before the District Judge and in Their Statement of Points on Appeal.

The arguments made by Appellants, refuted herein-after in Subsections B, C and D of this Heading IV, are raised for the first time in this Court, not having been urged either before the District Judge or in the Statement of Points on Appeal. [See Tr. pp. 76-79.] As a matter of fact, in their Statement of Points Appellants impliedly asserted that these contentions which they now make were invalid. For each of them, if valid, would result in a conclusion that Appellee should have no recovery at all; the Statement of Points, however, contends that the Referee "correctly determined" that the Trustee was entitled to a judgment for \$8,906.95. [Tr. p. 77.]

Since the complete record has not been brought here,⁶ Appellants cannot rely on purported issues which they

⁶None of the evidence is contained in the present record, Appellants having chosen to omit designating the transcripts and exhibits which were before the Referee and District Judge. [See Pretrial Order, Tr. pp. 28-29.]

failed to specify in their Statement of Points. Federal Rules of Civil Procedure, Rule 75(d), provides in part as follows:

“If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.”

The Rule therefore makes unavailable to Appellants any grounds omitted from their Statement.

E.g.,

Jesionowski v. Boston & Maine R. Co., 329 U. S. 452 (1947);

Ritchie v. Drier, 165 F. 2d 238 (C. A. D. C., 1947).

The points now sought to be raised, however, are without merit in any event, and are discussed in the following subsections of this Brief.

B. Appellants' 79-day Delay in Recording the Chattel Mortgage Was Not Excusable Under the Circumstances of This Case.

The argument that the delay of 79 days in recording the mortgage was excusable in this case (Op. Br. pp. 21-22) is wholly without foundation. In the first place, far shorter delays have been held to be fatal, apparently as a matter of law.

See, *e.g.*,

In re Hansen, 268 Fed. 904 (S. D. Cal., 1919);

In re Kessler, 90 Fed. Supp. 1012 (S. D. Cal., 1950).

Furthermore, the testimony before the Referee revealed that the dishonesty of Appellants' employee, who overlooked the recording, consisted of an embezzlement which was completely unconnected with the chattel mortgage; that the employee breached no fiduciary duty with respect to the mortgage, nor did he attempt to conceal it, but merely was guilty of neglect in not promptly placing it of record. Finally, the transcripts would show that one of the appellants testified that the excitement concerning his then planned wedding contributed to the lateness of recordation.

For these reasons, both the Referee and District Judge found and concluded that the delay was "unreasonable" [Tr. pp. 67, 57, 34]; indeed, Appellants did not even suggest the contrary until their Opening Brief in this Court. Clearly it is too late now to make such a contention.

C. A Purchase Money Chattel Mortgage Is Not Exempted From the Recordation Requirement of Section 2957 of the California Civil Code.

So far as can be ascertained, no one has ever before seriously contended that a purchase money chattel mortgage need not comply with the prompt recordation requirement of Section 2957 of the California Civil Code. The command of the section applies to all mortgages of personal property, without exception.

In *Citizens Nat. Trust & Savings Bank v. Gardner*, 161 F. 2d 530 (C. A. 9, 1947), and *In re Mercury Engineering*, 68 Fed. Supp. 376 (S. D. Cal., 1946), purchase money chattel mortgages were involved. While in both cases the relatively short delays in recordation were held excusable because of the particular facts, the

opinions make it clear that purchase money, as well as other types of chattel mortgages, must be promptly recorded under Civil Code Section 2957.

Appellants point out that Civil Code Section 3440 (now Sec. 3440.1), requiring in certain cases the filing of a 10 day notice of intention to execute a chattel mortgage, has been held inapplicable to purchase money transactions; the argument is that a similar exemption should be read into Section 2957.

The two sections, however, have different purposes. The Section 3440 notice is intended to afford creditors an opportunity to protect their rights before the debtor transfers or encumbers assets upon which the creditors may have relied in extending credit. In a purchase money transaction, where the debtor is acquiring new assets rather than disposing of old ones, the purpose of Section 3440 is not defeated by excusing the notice requirement.

Citizens Nat. Trust & Savings Bank v. Gardner,
161 F. 2d 530, 532-533 (C. A. 9, 1947).

On the other hand, one of the aims of Section 2957 is to protect creditors against secret liens on property which the debtor apparently owns outright. The danger from secret security interests is just as great in the case of purchase money chattel mortgages as in any other type, especially as to creditors who extend credit in the interim between the time the debtor takes possession of the property and the date on which recordation reveals the existence of the encumbrance. To excuse a purchase money instrument from prompt filing under Section 2957 would *pro tanto* frustrate the legislative purpose of that section. Indeed, *In re Mercury Engineering*, 68 Fed. Supp. 376 (S. D. Cal., 1946), cited and quoted by Appel-

lants (Op. Br., App. pp. 1-3), recognizes the difference in the functions of Sections 3440 and 2957 of the Civil Code.

D. Appellants' Repossession of the Chattel Mortgaged Property Shortly Before Bankruptcy Did Not Affect the Trustee's Powers to Set Aside the Transfer, or Recover the Fair Value Thereof, Under the Avoiding Sections of the Bankruptcy Act.

Appellants seem to suggest that the fact they repossessed the chattel mortgaged property prior to bankruptcy in some way improved their position or cured the defect of tardy recordation. (See Op. Br. pp. 26-28.) Whatever may be the law in other states, there is no doubt in California but that a creditor, as to whom a chattel mortgage is defective, can attack it either before or after the chattel mortgagee has taken possession. The leading case of *Noyes v. Bank of Italy*, 206 Cal. 266 (1929), established the rule that the avoiding powers of a Trustee in Bankruptcy, in California at least, are not affected by the repossession of the property prior to bankruptcy. The California Supreme Court there held, 206 Cal. at 270:

“Even if it be assumed that a mortgage void as to creditors pursuant to the plain terms of the statute could be transformed into a valid mortgage by the mortgagee seizing the mortgaged property or by otherwise taking possession of the same with the consent of the mortgagor and thus shut out general creditors or creditors not possessing a lien or armed with process, yet we are satisfied that it was the intention of the Bankruptcy Act to safeguard the rights of such general creditors by giving the trustee the status of a lien creditor and also to prevent the

mortgagee from defeating the rights of the creditors of the bankrupt by contending that such creditors were general creditors only. It seems reasonable to conclude, also, that the purpose of the Bankruptcy Act investing power in the trustee to attack a chattel mortgage void under the statute was to render ineffectual as to creditors the act of the mortgagee in taking possession of the property before the commencement of the bankruptcy proceedings. In other words, the trustee was intended to be placed in the position of a lien creditor who would, but for the bankruptcy proceeding, be entitled to attack the alleged void mortgage and to enable him to protect the interests of general creditors against invalid liens, unlawful transfers, etc.”

Conclusion.

For the foregoing reasons, the Order of the Hon. Ben Harrison, United States District Judge, dated July 30, 1957, should be affirmed.

Respectfully submitted,

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No. 15781
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN
MILLER, and ELIAS MILLER and PAUL MILLER, as
Executors of the Estate of George Miller, Deceased,
Appellants,

vs.

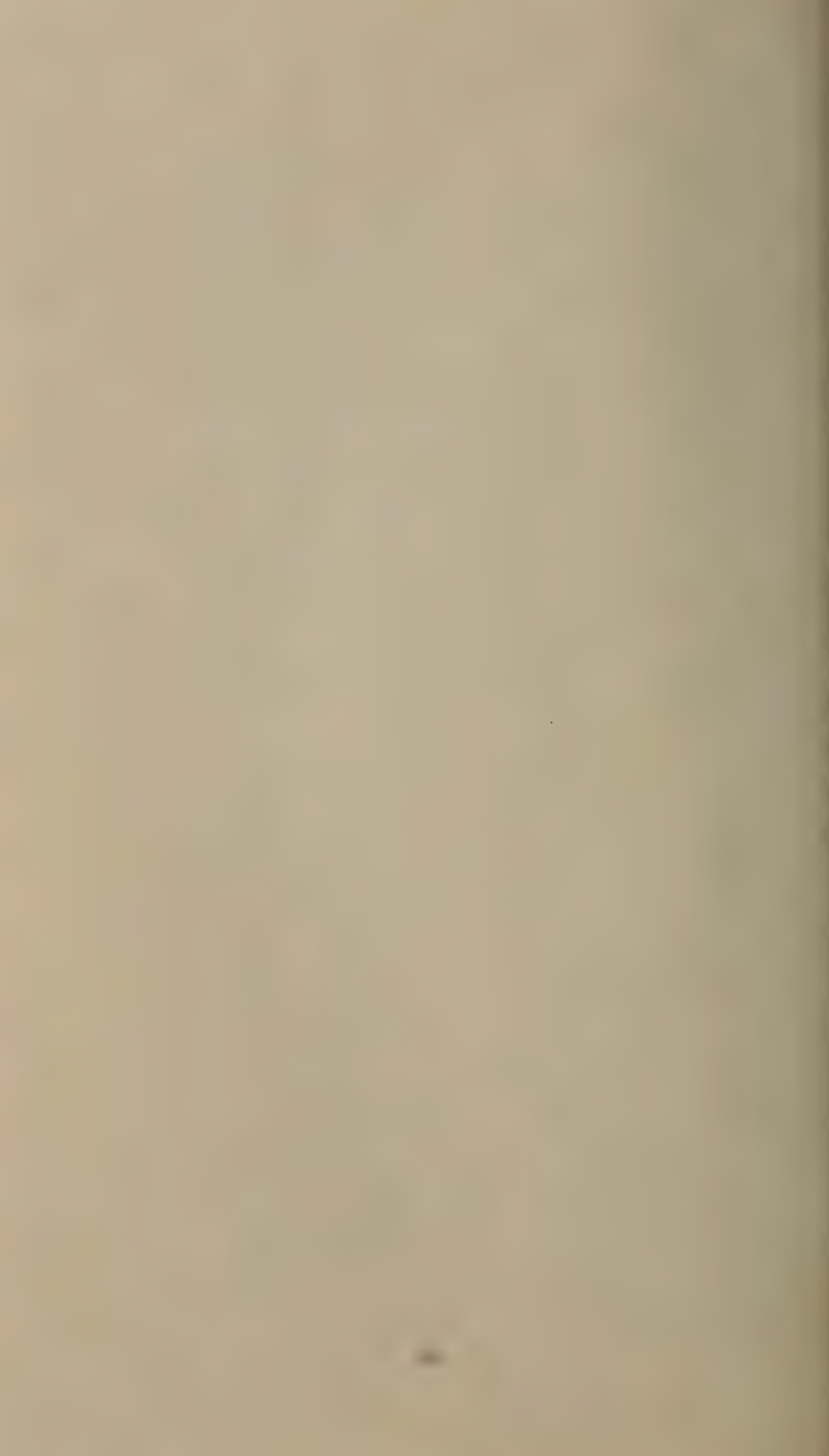
IRVING SULMEYER, Trustee in Bankruptcy of the Estate
of Delcon Corporation, Bankrupt,
Appellee.

On Appeal From the District Court of the United States for
the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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No. 15781
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ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN
MILLER, and ELIAS MILLER and PAUL MILLER, as
Executors of the Estate of George Miller, Deceased,
Appellants,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate
of Delcon Corporation, Bankrupt,
Appellee.

On Appeal From the District Court of the United States for
the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

Preliminary Statement.

We precede this answer to the trustee's Reply Brief with a restatement of the well-established rule of law that each case must stand and be determined on its own merits, and that legal principles applicable to one set of facts are not necessarily controlling in respect to a materially different factual situation. (*Cf., Barber v. Barber*, 160 A. C. A. 15, at 18.) An examination of the Appellee's Brief reveals that no serious consideration was given by the trustee to this axiom.

We believe and respectfully contend that there is a great factual divergence between the case at bar and the cases cited in the Appellee's Brief. Clearly, trustee's reliance on the authorities cited in his brief is misplaced.

For the convenience of the court we present below a brief summary of the material facts involved in the case at bar which we believe were not present in the cases cited by the appellee, and of the controlling legal principles.

1. The instant chattel mortgage is a purchase price mortgage; the question whether recordation of a purchase price mortgage is required under Section 1957 of the California Civil Code has not as yet been adjudicated by the California State Court; and the authorities cited by appellee are inapposite to the present record.

2. On the date of consummation of the present chattel mortgage transaction (which took place more than four months preceding bankruptcy) the bankrupt-mortgagor *was solvent*. The bankrupt had no existing creditors, other than appellants to whom it was then indebted for the major part of the purchase price of the appellants' valuable property then sold to the bankrupt.

3. *Unlike the chattel mortgage transaction involved in the case of Moore v. Bay* (284 U. S. 4), the record herein does not show, and it is not claimed by the trustee, that appellants failed to record a notice of their intended chattel mortgage prior to its consummation as required by Sections 3440 and 3440.1 of the California Civil Code. *There-*

fore, the instant chattel mortgage was not conclusively fraudulent and void. (The factual setting in the *Moore* case is analyzed *infra*.)

4. On the date of the recordation of present chattel mortgage (which was also more than four months preceding bankruptcy) the bankrupt had possession of appellants' valuable business and property without payment therefor; *the bankrupt was solvent at that time and the then existing creditors were not prejudiced.*

5. The creditors who came into existence between the execution and the recordation of the present chattel mortgage (other than the appellants) were all simple creditors. Under the California state law said general creditors had no lien upon the mortgaged property by virtue of any legal proceedings; nor were they "armed with some process authorizing seizure of the property." They were not in a legal position to attack the validity of the present chattel mortgage on the basis of its assumed delayed recordation.

6. The bankrupt was admittedly in default under the terms of the valid chattel mortgage; and same was not void and fraudulent under Sections 3440 and 3440.1 of the California Civil Code. Appellants had the legal right to foreclose their security and to recapture the mortgaged property *up to and within four months of the date of bankruptcy*; and appellants were lawfully in possession of the located chattel mortgaged property prior to bankruptcy.

7. The status of a trustee in bankruptcy is determinable by the federal law. Under the Bankruptcy Law he could

not recover the property from the appellants, since appellants had obtained possession thereof *before bankruptcy*. *Up to bankruptcy* the trustee did not possess the right of a lien creditor. The “strong arm” doctrine, or “mythical creditor” theory is inoperative where the creditors of the bankrupt had no lien right in the mortgaged property prior to bankruptcy.

The above stated controlling legal principles are amply supported by the decisional law cited *infra*. We respectfully submit that the authorities relied on by the appellee in his Reply Brief have no factual or legal relationship to the precise problems presented for decision upon this record. As pointed out in our Opening Brief the trustee’s inequitable postulate is not justified under the Bankruptcy Law in its application to the facts posed by the record herein.

We further point out *infra* that appellants are *not* foreclosed from raising the contention that the trustee was not entitled to a personal money judgment against appellants *in any amount* despite their failure to file a cross-petition for review of the Referee’s order under Bankruptcy Section 39C, or despite their failure to include this contention in their Concise Statement of Points relied on.

Our answer to the contentions advanced by the trustee in his Reply Brief is amplified as follows:

I.

The Case of *Moore v. Bay* (284 U. S. 4) Does Not Involve the Issue of Delayed Recordation of a Chattel Mortgage Under California Civil Code Section 1957. The Decision Therein Is Predicated on the Failure of the Mortgagee to Record a Notice of the Intended Chattel Mortgage Under California Civil Code Section 3440. Therefore the Chattel Mortgage in the *Moore* Case Was Conclusively Fraudulent and Void Against All Creditors. Such Is Not the Case Here.

We respectfully submit that the critical facts on which the decision of the United States Supreme Court in the *Moore* case was predicated are absent in the case at bar. The facts are crystallized in the opinion of this court reported in 45 F. 2d at page 449. Reduced to essentials, they are as follows:

1. A notice of the intended chattel mortgage involved in the *Moore* case *was not recorded prior to its execution or filing in the office of the County Recorder*; and the chattel mortgage was therefore *conclusively fraudulent and void* under the express and mandatory provisions of California Civil Code Section 3440 then in force.¹

¹Civil Code Section 3440 in force prior to 1953 provided that, unless a notice of an intended chattel mortgage was recorded at least 7 days prior to its execution or filing, the chattel mortgage will be conclusively presumed to be fraudulent and void as against existing creditors. In 1953 Section 3440 was amended by adding thereto Section 3440.1 which provides, *inter-alia*, that the recording of a notice of the intended chattel mortgage must precede at least 10 days (instead of 7 days) its execution or filing. Section 3440 as amended by Section 3440.1 is set out in pertinent part in the appendix to this brief.)

2. The mortgaged property in the *Moore* case *was in the possession of the bankrupt* on date of bankruptcy; and the receiver appointed by the bankruptcy court was in lawful and physical possession thereof on date of bankruptcy and at all times thereafter.

3. The mortgaged property in the *Moore* case had not been recaptured by the mortgagee at any time prior to bankruptcy.

It is to be added that the opinion in the *Moore* case does not indicate whether the required notice of the intended chattel mortgage was ever recorded, either prior to its execution and filing, or at any time prior to bankruptcy.

It is obvious that the chattel mortgage in the *Moore* case was a nullity *ab initio* (*cf.*, *Mitchell v. Setsler*, 84 Cal. App. 2d 716 at 720), since the objectives sought to be accomplished by recording a notice of an intended chattel mortgage under Civil Code Sections 3440 and 3440.1 were to protect all creditors against *fraudulent sales or mortgages*.

See also:

Jubas v. Sampsell, 185 F. 2d 333 (9th Cir.);

Malaquias v. Novo, 59 Cal. App. 2d 225, 138 P. 2d 729;

Woodruff v. Laugharn, 50 F. 2d 532 (cert. den.).

In the case at bar, the chattel mortgage was valid. It was not fraudulent under Civil Code Sections 3440 and 3440.1. Furthermore, the mortgaged property had been recaptured by appellants prior to bankruptcy under the provisions of their chattel mortgage in accordance with the California state law.

It is crystal clear that the decision in the *Moore* case does not sustain the trustee's inequitable dogmatic premise that appellants' chattel mortgage was void under the facts in this case.

II.

The Bankrupt Was Admittedly in Default Under the Terms of the Chattel Mortgage. Appellants Had the Legal Right to Foreclose Their Chattel Mortgage Security and to Recapture the Mortgaged Property Under the California State Law Up to and Within Four Months of the Date of Bankruptcy.

Appellants were therefore in lawful and physical possession of the mortgaged property prior to bankruptcy; and under the bankruptcy law the trustee could not reclaim it from the appellants or recover its fair value.

This precise legal point was decided adversely to the contentions of the trustee by District Judge Mathes in the recent case of *Tollefsen Trustee v. North American Van Lines*, District Court No. 18334-BH (the opinion was rendered on April 14, 1958, and is not as yet published).

The last cited case was a plenary action in which the writer of the brief was the attorney for the defendant. It was brought by the trustee in bankruptcy to recover from the defendant a voidable preference of personal property in excess of \$15,000.00, and also the fair value of other personal property the defendant had recaptured from the bankrupt (when the bankrupt was insolvent) under the terms of chattel mortgages and conditional sales contract executed by the bankrupt more than four months prior to bankruptcy. Judge Mathes ruled adversely to the trustee on all of the issues in the case; and on the issue of the

legal right of the defendant to repossess the mortgaged personal property prior to bankruptcy the court stated at page 11 of its typewritten opinion as follows:

“There is no dispute but that the chattel mortgages and conditional sales contracts were valid and were entered into more than four months before bankruptcy. If in default there can be no question, then, of defendant’s right to foreclose its security according to the terms of the contracts and mortgages up to and within four months of the date of bankruptcy. (See the discussion and authorities cited in MacLachlan on Bankruptcy Section 216 (1956); and see also the discussion in *Straton v. New*, 283 U. S. 318, 325-326 (1931).)

“In other words, since the contracts and mortgages were executed, were admittedly valid and were executed within four months prior to bankruptcy, the security could be foreclosed within the four-month period just the same as it could be prior to the commencement of the four-month period.”

The above ruling by Judge Mathes represents the well settled law.

In 4 Remington on Bankruptcy at page 441, Paragraph 1728.3, it is stated:

“A chattel mortgage usually gives the mortgagee the right to take possession of the property mortgaged and to foreclose in case of default, and the chattel mortgage statutes in many states make possession of the property by the mortgagee equivalent to recording of the mortgage, either directly, or by providing that the mortgage shall not be effective as against creditors unless accompanied by change of possession, etc. The mortgagee, by coming lawfully into possession of the property *before filing of the bankruptcy petition*, can

accordingly, under such provisions, perfect his rights as against the rights of the trustee in bankruptcy of the mortgagor under §70(c) of the Act.” (Italics supplied.)

Sexton v. Kesster, 225 U. S. 90, 32 S. Ct. 657, was a plenary action brought by the trustee to set aside a fraudulent preference of securities. A valid agreement was made between the defendant and the bankrupt prior to bankruptcy, under which the defendant was entitled to have possession of the securities under certain conditions. Under the terms of the agreement the securities came into the lawful possession of the defendant prior to bankruptcy, *where the bankrupt was insolvent*. The court held in an opinion written by Mr. Justice Holmes (the author of the opinion in the *Moore* case) that the trustee could not reclaim the possession of the securities. At page 659 of the opinion (32 S. Ct.) the court said as follows:

“The bankruptcy law by itself does not avoid the transaction. (Cases cited.) A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment. (Cases cited.)”

It is clear that the personal judgment against the appellants for the value of the mortgaged property captured by them under the terms of their chattel mortgage in accordance with the state law prior to bankruptcy cannot be sustained under the facts in this case.

III.

The Status of a Trustee in Bankruptcy Is Defined by the Federal Law, and the Power to Attack Invalid Liens Under the State Law Is Conferred Upon Him by the Bankruptcy Act.

While the substantive law bearing on the validity of liens is determinable by the state law, the state is powerless to determine the conditions under which the trustee may attack the validity of the liens. The power of the trustee to attack validity of liens and to set aside conveyances by the bankrupt in fraud of his creditors is derived solely from Section 70 of the Bankruptcy Act.

Moore v. Bay, supra.

In *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, 68, 58 S. Ct. 817, 82 L. Ed. 118, the Supreme Court declared that *except in matters governed by the Federal Constitution or by Acts of Congress* the law to be applied in any case is the law of the state.

See also:

Woods v. Interstate Realty Co., 337 U. S. at 538-539, 69 S. Ct. at 1237-1238, 93 L. Ed. 1524;

Harms v. Tops Music, etc. 160 Fed. Supp. 77 at 81.

It follows that the construction placed by the California Supreme Court on the power of a trustee in Bankruptcy under Section 70 of the Bankruptcy Act in *Noyes v. Bank of Italy*, 206 Cal. 266 at 270 (cited by appellee at p. 29 of his Rep. Br.), must yield to the construction placed thereon by the federal law explicated under the preceding heading.

Furthermore, the statement in the *Noyes* case, *supra*, relied on by the trustee in bankruptcy at pages 29-30 of his brief is only a dictum under the facts therein involved.

IV.

Under the Bankruptcy Law the Trustee Did Not Possess the Right of a Lien Creditor. The “Strong Arm” Doctrine, or “Mythical Creditor” Fiction Is Inoperative Where Simple Creditors of the Bankrupt Had No Lien on the Bankrupt’s Property Prior to Bankruptcy Under the State Law.

This point is discussed at pages 27 and 28 of Appellants’ Opening Brief. In addition to the cases there cited, the court’s attention is respectfully invited to the following authorities:

In 3 Remington on Bankruptcy it is stated at page 564:

“Section 70(c), like its predecessor, §47(a)(2), gives the trustee status as a creditor with lien obtained by legal or equitable proceedings *only as of bankruptcy*. Therefore, if the deed, mortgage, or contract in question was duly recorded *before that date in the manner and form required by law*, §70(c) is of no assistance. *The statute permits the trustee to conjure up a mythical creditor, but only one with a lien at date of bankruptcy.*” (Italics supplied.)

In *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 60 L. Ed. 275, 36 S. Ct. 50, the court declared:

“Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in §47(a) as amended. As this was not done, we think the better view, and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time *when the petition in bankruptcy is filed*. *Here the petition was filed almost two months after*

the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the State.” (Italics supplied.)

It bears emphasis that the mortgaged property in the case at bar was not *in custodia legis*, either on date of bankruptcy or at any other time; but that it was in the physical possession of the appellants on date of bankruptcy and for some time prior thereto.

Cf., discussion *In re New Haven Clock, etc.*, 253 F. 2d 577 (decided March 28, 1958).

We respectfully submit that under the authorities cited *supra* in this Closing Brief and under the authorities cited in our Opening Brief, the appellants' chattel mortgage which was perfected more than four months before bankruptcy was valid as against all creditors under the applicable California state law; and that in any event the trustee was not a lien creditor under the "strong arm" concept as construed under the federal law.

V.

The Other Authorities Cited in Appellee's Reply Brief Are Not in Point in Their Application to the Facts in the Case at Bar.

We respectfully submit that authorities cited in the Appellee's Brief on the issue of a delayed recordation are all predicated on divergent factual situations; and as applied to the facts in the case at bar the legal bankruptcy principles therein discussed are mere generalities. The facts in the case at bar are fairly summarized in our Opening Brief; a restatement thereof would invite a charge of redundancy, and we would not be justified to belabor further

the divergence between the facts in the case at bar and the facts in the authorities cited in the Appellee's Brief. It suffices to point to the all important following facts in the present record which were absent in the cases relied on by the appellee.

1. Appellants' purchase price chattel mortgage had been duly perfected more than four months preceding bankruptcy.

2. The bankrupt was solvent both on the date of the execution and on the date of the perfection of their chattel mortgage; and there is nothing in the record to indicate that the creditors who came into existence prior to the perfection of the chattel mortgage were in any way prejudiced because of the assumed prior delayed recordation of the chattel mortgage.

3. Appellants had the legal right to recapture the mortgaged property under the California applicable law.

4. *The recaptured mortgaged property was not in the possession or custody of the bankruptcy court at any time.*

5. Under the California law none of the bankrupt's creditors had a lien on the bankrupt's property prior to bankruptcy; that the trustee's fictitious lien did not exist before bankruptcy, and the "strong arm" doctrine or hypothetical lien creditor fiction was inoperative under the bankruptcy law.

As stated in the forepart of this brief, legal principles applied to one set of facts are not necessarily controlling in respect to a materially different factual situation.

VI.

Appellants Are Not Foreclosed From Raising the Point That the Trustee Was Not Entitled to a Personal Money Judgment in Any Amount.

The merits of this point are discussed at page 26 of our opening brief. Viewed with an eye to the merits of appellants' position, it is patently clear that appellants should not be deprived of their property rights in the mortgaged chattels and at the same time to be called upon to pay a large sum of money for their own property. We respectfully submit that the non-jurisdictional grounds urged by the trustee in opposition to our contention are without merit and not in the interest of justice. Our short answer to the following non-jurisdictional grounds urged by the trustee is as follows:

A.

The failure of appellants to file a cross-petition for review of the Order of the Referee under Section 39(c) of the Bankruptcy Act did not oust the District Court of jurisdiction to adjudicate the issue whether appellants should be saddled with any judgment in any amount. Section 39(c) must be read together with the other Sections of the Bankruptcy Act which in effect provide that courts of bankruptcy shall have jurisdiction to adjudicate all issues arising in connection with the distribution of the bankrupt's estate until the bankruptcy case is closed. Section 39(c) merely outlines the procedure to be followed in obtaining a review of a referee's order. In interest of certainty and uniformity, Section 39(c) sets forth the procedural steps to be taken in order to calendar the record before the District Judge; and the

District Judge is given the power to review the orders of the Referee *sua sponte*, or upon an informal petition, at any time before the closing of the estate.

See discussion in

2 Collier on Bankruptcy (14th Ed.), beginning at p. 1473.

Cf., *Pfeister v. Northern Illinois Etc.*, 317 U. S. 144, 63 S. Ct. 133, at p. 137 (2, 5).

In *In re Albert*, 122 F. 2d 393, the court said at page 394, as follows:

“We think the statutory limitation is not a condition *upon jurisdiction*, . . . *The jurisdiction of the bankruptcy court* when invoked by the filing of the petition continues until the estate is closed. (Cases cited.) Its power to review orders of referees flows from Sec. 2(10) of the Act, 11 U. S. C. A. §11(10), and nothing in Sec. 39, sub. c, expressly limits that power.” (Italics supplied.)

Clearly, the District Judge had the jurisdictional power to adjudicate all the issues presented by the record, whether or not the issues are pinpointed by either of the parties.

Furthermore, the facts in the case at bar are not in dispute; *the facts* bearing on the validity of the challenged chattel mortgage are all in the present record, and the only issue before the District Court was one of law. It is well settled that the court is not bound by erroneous legal concessions of counsel.

B.

Equally, the failure of appellants to raise the above point in their Concise Statement of Points Relied On filed in this court did not deprive this court of jurisdiction to consider this all important point.

In this connection, the writer of this brief represents that he was not the trial counsel, either before the Referee or in the District Court; that he had no opportunity to become fully familiarized with the law applicable to the present record, and for this reason he inadvertently failed to include this point in the appellants' Concise Statement of Points.

Respectfully submitted,

SYLVAN Y. ALLEN,

MAX MAYER and

WILLIS & MACCRACKEN,

By ERNEST R. UTLEY,

Attorneys for Appellants.

APPENDIX.

California Civil Code, Sections 3440 and 3440.1 cover the subject of *fraudulent conveyances*.

Section 3440 reads in pertinent part as follows:

“CONCLUSIVE PRESUMPTION OF FRAUD. Every transfer of personal property and every lien on personal property made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, *is conclusively presumed fraudulent and void as against the transferor's creditors. . . .*” (Italics supplied.)

Section 3440.1 reads in pertinent part as follows:

“The sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof, other than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment, or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant, *is conclusively presumed fraudulent and void as against the existing creditors of the vendor, transferor, assignor, or mortgagor, unless before the consummation of the sale, transfer, assignment, or mortgage, the vendor, transferor, assignor, or mortgagor, or the intended vendee, transferee, assignee, or mortgagee does all of the following:*

(a) Records at least 10 days before the consummation of the sale, transfer, assignment, or mortgage, in the office of the county recorder in the

county or counties in which the stock in trade, fixtures, or equipment are situated, a notice of the intended sale, transfer, assignment, or mortgage, which states the name and address of the intended vendor, transferor, assignor, or mortgagor and the name and address of the intended vendee, transferee, assignee, or mortgagee. The notice shall contain a general statement of the character of the merchandise or property intended to be sold, assigned, transferred, or mortgaged, and show the date and place where the purchase price or consideration is to be paid.

(b) Publishes at least once a copy of the notice in a newspaper of general circulation published in the judicial district in which the stock in trade, fixtures, or equipment are situated, if there is one, and if there is none in the judicial district, then in a newspaper of general circulation in the county embracing the judicial district. The publication shall be completed not less than five days before the date of the intended sale, transfer, assignment, or mortgage.” (*Italics supplied.*)

No. 15781

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN
MILLER, and ELIAS MILLER and PAUL MILLER, as
Executors of the Estate of George Miller, Deceased,
Appellants,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate
of Delcon Corporation, Bankrupt,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING OR REVISION OF
COURT'S OPINION AND DECISION.

SYLVAN Y. ALLEN,
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FILED

FEB 13 1959

PAUL P. O'BRIEN, CLERK

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No. 15781

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN
MILLER, and ELIAS MILLER and PAUL MILLER, as
Executors of the Estate of George Miller, Deceased,
Appellants,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate
of Delcon Corporation, Bankrupt,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING OR REVISION OF COURT'S OPINION AND DECISION.

Appellants (referred to herein occasionally as Millers), respectfully petition this Honorable Court for a rehearing, or revision of its opinion and decision filed herein on January 16, 1959. This petition is predicated on the following briefly and concisely stated grounds, which the opinion of the Court indicates were not considered by it, though same had been presented and argued by appellants at the oral argument.

We respectfully submit and urge this Honorable Court to reconsider its decision in the light of the applicable equitable principles of subordination expounded by the

United States Supreme Court in *Pepper v. Litton*, 308 U. S. 295, 60 S. Ct. 238, and by this Honorable Court in *Bank of America v. Erickson*, 117 F. 2d 796 at 798, which authorities were submitted by appellants at the oral argument. We wish to stress the further point that under the undisputed facts in this case and in the light of the opinion of this Court the fund realized by appellants upon the sale of the property covered by the instant chattel mortgage must be impressed with an *equitable lien* in their favor on the ground and under the equitable doctrine of unjust enrichment sought by the trustee, which was appropriately characterized by the Court as a “windfall” (p. 2, Opin. last par.). We respectfully submit that the claims of the creditors who came into existence after the perfection of Millers’ chattel mortgage (when the bankrupt was solvent), in equity and good conscience must be subordinated to Millers’ aforesaid equitable lien.

Brief Résumé of the Operative Facts.

The operative facts are clearly stated in the Court’s opinion and the glaring inequities of the Trustee’s position need not be repeated. However, a brief restatement thereof may serve to clarify and facilitate a clearer understanding of our contention that the *Moore v. Bay* decision of the United States Supreme Court (284 U. S. 4) is not applicable to the equitable situation presented by this record. Bearing on the inequities of the “windfall,” sought by the trustee the following operative facts bear emphasis:

1. Millers’ purchase price chattel mortgage was recorded on August 19, 1954, more than four months preceding the filing of the bankruptcy petition; the creditors who came into existence after the recordation of the

chattel mortgage had constructive notice of the Millers' purchase price chattel mortgage lien.

2. The chattel mortgage was recorded *when the bankrupt was solvent*; and the execution and recordation thereof, therefore, *did not constitute a preference* under 11 United States Code, par. 96 (Bankruptcy Act, par. 60) *as to any of the bankrupt's creditors*.

3. The judgment of the District Court awarding a *personal judgment* against Millers in the sum of \$82,500.00, enabled the creditors who came into existence after the recordation of the chattel mortgage (of which they had constructive notice more than four months preceding bankruptcy) *to become unjustly enriched* in that amount.

Equitable Principles.

1. Unjust enrichment is condemned by the California law, by which the substantive rights of the bankrupt's creditors are weighed and measured. The equitable doctrine precluding unjust enrichment is invoked by the California law regardless of the claimed legal invalidity of the instant chattel mortgage lien on the ground of its belated recordation.

2. The doctrine of unjust enrichment is rooted in the fundamental concept that courts of equity seek to do justice and equity and prevent unfair results.

3. An equitable lien is not a contractual lien; it is a creature of equity; the right of a creditor to have a certain fund or specific property applied to payment of his debt rests on the equitable doctrine precluding unjust enrichment; and the object of an equitable lien is to prevent an inequitable assertion of rights resulting in unjust enrichment.

4. Courts of Bankruptcy are courts of equity; in the exercise of their equity jurisdiction bankruptcy courts are governed by equitable principles; the right of subordination is an equitable doctrine; and it exists to prevent inequitable results, regardless of the question of equitable liens.

5. Moreover, the equitable doctrine precluding unjust enrichment creates an equitable lien. It is a concept of recent progressive development and gradual proliferation; it is in the nature of a constructive or involuntary trust; and is invoked by courts of equity in the exercise of their equity jurisdiction.

6. The *Moore v. Bay* decision did not discuss or adjudicate rights of equitable lien creditors to subordination. Assuming *arguendo* (but not conceding) that (as this Honorable Court stated in its opin. at p. 4, second par.), that the *Moore* case could not be distinguished “*in principle*” from the case at bar, it is appellants’ principal contention that the *legal* principles therein announced must yield to *the equitable principles* of subordination explicated in the decisions cited below.

7. While under Section 60(6) of the Bankruptcy Act an equitable lien is not recognized “where available means of perfecting *legal liens* have not been employed,” (emphasis added) such does not destroy the right of an equitable lien creditor to priority of payment over simple creditors who came into existence after recordation of his legal lien within more than four months preceding bankruptcy and when the bankrupt was solvent.

ARGUMENT.

Initially we wish to re-emphasize the point that the *legal* factual situation presented in the *Moore v. Bay, supra*, is not comparable to the *equitable* factual situation presented by this record for the reasons pointed out in appellants' closing brief beginning at page 5. We respectfully submit that the statement in the opinion that the *Moore v. Bay* decision cannot be distinguished "in principle" from the case at bar is an incorrect statement of the law in the light of this record. We wish to re-emphasize further that the analysis made by the Referee of the decision in *Moore v. Bay* in its application to the present equitable factual record finds conclusive support in the underlying equitable philosophy of the Bankruptcy Act clearly explored by the Referee in his memorandum decision. However, these points have been adequately covered by appellants in their opening and closing briefs; and for this reason we would not be justified to burden this court with an additional argument on these points.

This petition is therefore addressed to the following major and subsidiary contentions which were stressed by appellants at the oral argument, but which were not passed upon by this Honorable Court in its opinion.

These several contentions we respectfully submit go to the very heart of the trustee's case. They merit careful consideration and study in view of the shocking inequities of the trustee's position; and same are presented in the following order.

I.

The Equitable Principles Which Govern in the Allowance, and Disallowance or Subordination of Claims in Bankruptcy Were Discussed in Our Oral Argument Before This Honorable Court on July 10, 1958.

At the oral argument we called the Court's attention to *Pepper v. Litton*, 308 U. S. 295, 60 S. Ct. 238 and *Bank of America v. Erickson*, 117 F. 2d 796 at 798; and we stated that the Supreme Court in *Pepper v. Litton*, *supra*, had modified or relaxed the harsh legal rule of law announced in *Moore v. Bay*.

In *Moore v. Bay*, the Supreme Court said:

"The Circuit Courts of appeal seem generally to agree, as the language of the bankruptcy act appears to us to imply very plainly *that what thus is recovered for the benefit of the estate is to be distributed in dividends of equal per centum on all allowed claims, except such as have priority or are secured.*" (Emphasis ours.)

Eight years later the Supreme Court announced the equitable rule of law governing the equitable powers of courts of bankruptcy relating to *distribution* of bankruptcy funds to creditors. The Court said:

"The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, *that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.* By reason of the express provisions of §2 these equitable powers are to be exercised on the allowance of claims, a conclusion which is fortified by §57, sub. k, 11 U. S. C. A.

§93 sub. k.12. For certainly if, as provided in the latter section, a claim which has been allowed may be later 'rejected in whole or in part, according to the equities of the case,' disallowance or *subordination in light of equitable considerations* may originally be made." (Emphasis ours.)

Following this equitable rule, this Honorable Court, in *Bank of America v. Erickson*, 117 F. 2d 896 at 898, said:

"The bankruptcy court has undoubted power to subordinate a general claim to other claims in the same category where for any reason, legal or equitable, it ought to be subordinated."

Therefore, under the authority of *Pepper v. Litton* and *Bank of America v. Erickson*, *supra*, the bankruptcy court has the "undoubted power" to subordinate one or more general claims to others of the same classification where for any reason, legal or equitable, they should be subordinated.

In other words, the Supreme Court, in *Moore v. Bay*, holds that creditors of *the same classification* must be paid equal dividends; and later, in *Pepper v. Litton*, the Supreme Court holds that under the equitable principles of the bankruptcy law, the bankruptcy court has the power to subordinate claims whenever they should be subordinated.

In *Moore v. Bay*, the Supreme Court had before it a strictly legal question, whereas, in *Pepper v. Litton*, it was dealing with equitable principles of the bankruptcy law which govern in the allowance of claims.

II.

This Honorable Court Has Power, and Should, Under the Evidence, Subordinate the Claims of Creditors Which Were Contracted Subsequent to the Recordation of the Miller Mortgage.

We believe and respectfully submit that the facts in this case require and demand the application of the equitable principles of subordination of claims enunciated in *Pepper v. Litton*, 308 U. S. 295, 60 S. Ct. 238, and by this Honorable Court in *Bank of America, etc., v. Erickson*, 117 F. 2d 796 at 798.

The Referee, in his memorandum opinion, says: "We have here a situation which literally shocks the conscience of the Referee. . . ." If we interpret the views of this Honorable Court correctly from the language of its opinion, it felt much the same way, but felt bound to follow the ruling in *Moore v. Bay*, 284 U. S. 4.

Had the equitable principles announced in *Pepper v. Litton* and *Bank of America, etc., v. Erickson*, above cited, entered the mind of the Referee while he was writing his opinion, it is obvious, we believe, that he would have subordinated the claims of creditors of the bankrupt which were contracted *after the recordation of the Miller chattel mortgage* to the other general claims, including the Miller claim.

It is clear that the result which the order of the Referee would have accomplished is exactly the same as it would have been had he held that the instant chattel mortgage was void under *Moore v. Bay*, and yet under the equitable power of the court, subordinated these late claims to

those of the other general creditors. Such a ruling would have been safe from the attack of the trustee under the evidence of the case and under the law above cited.

We believe, therefore, that this Honorable Court has the power and duty to subordinate these late claims, or at least to refer this matter back to the District Court for a further hearing upon the issue of subordination. Certainly appellants should not be denied a hearing upon the question of the subordination of the late claims. There was no necessity of raising the issue of the right of subordination before the Referee in the first instance because his order granted the necessary relief to the appellants. It would not now become so important except for the limited remand of the District Court hereinafter mentioned were it not for this limited remand, appellants would have the desired remedy under Section 57(k) of the bankruptcy act.

III.

The District Court, by the Nature of Its Order, Should Not Have Foreclosed the Right of Any Interested Party to Petition the Referee for an Appropriate Order of Subordination.

The order of the District Court remanded the case to the Referee for the *sole* purpose of determining whether appellants were entitled to certain credits against the judgment in favor of appellee.

Were it not for this order limiting the purpose of the remand, appellants would still be free to go before the Referee and petition for a subordination of the claims which were contracted after the recordation of the chattel

mortgage under *Pepper v. Litton*, and under Section 57(k) of the bankruptcy act.¹ But, we fear that the above limited remand would prevent a further hearing under Section 57(k) of the bankruptcy act. The language would, at least, embarrass the Referee in going forward, and he might be very reluctant to do so, unless this Honorable Court modifies the Order made by the District Court.

IV.

The Fund Realized by Appellants Upon Their Sale of the Mortgaged Property Must Be Impressed With an Equitable Lien in Their Favor.

The doctrine precluding unjust enrichment has been settled in the recent California decisions cited in *Bensinger v. Davidson*, 147 Fed. Supp. 240 at 247. As stated by Judge Carter in the last cited case at page 247:

“We think the California cases rest on the principle of ‘unjust enrichment’ and the policy of the law against forfeitures. This language runs through the California cases. We therefore approach the problem on equitable principles. Has Bensinger been unjustly enriched, and if so, by how much?”

¹Section 57(k) and (1) provides:

“k. Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

1. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part, and the trustee may also recover any excess dividend paid to any creditor. The court shall have summary jurisdiction of a proceeding by the trustee to recover any such dividends.”

In *Bullen v. De Brettville*, 239 F. 2d 824, this Honorable Court, speaking through Judge Barnes, said at page 831:

“That an equitable lien may be established, ‘in the absence of an express contract, . . . out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing.’ ”

In *United States v. Admant Co.*, 197 F. 2d 1, Judge Yankwich speaking for this court said at page 10:

“[12-14] An equitable lien is a creature of equity. It is the right to have a fund or specific property applied to the payment of a particular debt. It is based on the equitable doctrine of unjust enrichment.”

In *Brunson v. Babb*, 145 Cal. App. 2d 214, the California Court said at page 229:

“Tested by the standard that equity courts look with favor upon equitable liens when employed to do justice and equity, and to prevent unfair results, we are satisfied that, under the facts and circumstances present in the case at bar, the court was justified in finding that an equitable lien was created.”

In Restatement of the law on Restitution, par. 160(c) at page 642, it is stated:

“c. UNJUST ENRICHMENT. A constructive trust is imposed upon a person in order to prevent his unjust enrichment.”

In Restatement of the law on Security, par. 59(c) at page 160, it is stated:

“c. EQUITABLE LIEN. The term ‘lien,’ in its broadest sense includes equitable liens, which do not depend upon possession. Equitable lien is defined in the Restatement of Restitution, §161, as follows: ‘Where property of one person can by a proceeding in

equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises.’”

Pomeroy in Equity Jurisprudence, in interpreting the maxim that he who seeks equity must do equity said in Section 385:

“That whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the Court will not confer its equitable relief upon the party seeking its interposition and aid, unless he acknowledge and concede, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adverse party and growing out of or necessarily involved in the subject matter of the controversy.”

V.

The Validity of Millers’ Equitable Lien Is Not Impaired by Section 60a(6) of the Bankruptcy Act.

It is to be observed that the 1950 amendment to the Bankruptcy Act [60a(6)] *did not indicate a disapproval of all equitable liens.*

(Cf. *Danais v. De Matteo Construction Co.*, 102 Fed. Supp. 874; *Cumberland Portland Cement Co. v. Reconstruction, etc.*, 140 Fed. Supp. 739 at 753; *In re William P. Bray Co.*, 127 Fed. Supp. 627.)

The legislative history of this amendment is explicated in *Cumberland Portland Cement Co.*, *supra* at page 753. *It will be seen that this amendment is aimed solely at preferences; and same is not concerned with the legal effect of late recordation of Chattel Mortgages under the State law.*

In the case at bar the Millers’ mortgage *was perfected more than four months prior to bankruptcy and at a time*

the bankrupt was solvent; therefore a preference has not been created.

We respectfully submit that this furnishes an additional potent reason requiring a subordination of these late claims in the light of the authorities cited *supra*.

Conclusion.

In conclusion may we respectfully urge upon this Honorable Court that it modify the judgment of the District Court by directing a subordination of the claims which came into existence after the recordation of the Miller mortgage; or in the alternative it modify the judgment of the District Court in such a manner that it will clearly give appellants the right to petition the Referee to have the late claims subordinated to the payment of other general claims, including their subordination to the Miller claim.

Respectfully submitted,

SYLVAN Y. ALLEN,

MAX MAYER, and

WILLIS & MACCRACKEN, and

ERNEST R. UTLEY,

Attorneys for Appellants.

Certificate of Counsel.

The undersigned, counsel of appellants, does hereby certify that in his judgment this petition for rehearing or revision of the opinion of this Honorable Court is well founded and same is not interposed for delay.

ERNEST R. UTLEY,

Of Counsel for Appellant.



No. 15782

**United States
Court of Appeals
for the Ninth Circuit**

ADOLPH G. HOFFMAN,

Appellant,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. F. SYDNEY HAN-
SEN,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
District of Oregon**

FILED

No. 15782

United States
Court of Appeals
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. F. SYDNEY HAN-
SEN,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

No. 7351

ADOLPH G. HOFFMAN,

Plaintiff,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. F. SYDNEY HAN-
SEN,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiff for a second amended cause of action against defendants, and each of them, complains and alleges as follows:

I.

That plaintiff and all defendants are citizens of the United States of America and of the State of Oregon, and are domiciled and reside in the State and District of Oregon, within this judicial district; that this Court has jurisdiction under the provisions of U.S.C. Title 28, Section 1331 and 1343.

II.

That this action arises under the United States Constitution and particularly Article I, Section 8, Article IV, Section 4, Amendments XIII and XIV, and Laws of the United States, Title 18 U.S.C. 231, 241, 242; Title 28 U.S.C. Section 1331 and 1343; Title 42 U.S.C. 1981-1988; Title 52 U.S.C. Section 203.

III.

That at all times herein mentioned Dr. F. Sydney Hansen, defendant above named, was and still is the County Health Officer of Multnomah County, State of Oregon.

IV.

That at all times herein mentioned defendant C. H. Halden was and is a Deputy County Health Officer of Multnomah County, State of Oregon, and acted as an agent and employee of defendant Dr. F. Sydney Hansen.

V.

That at all times herein mentioned Dr. Donald E. Wair, defendant above named, was and still is Superintendent of the Oregon State Mental Hospital at Pendleton, Oregon.

VI.

That at all times herein mentioned defendant Dr. George F. Keller was and still is a duly licensed and practicing physician within the State of Oregon.

VII.

That up to and including on or about the 18th day of June, 1956, in the State of Oregon the defendants, and each of them, conspired to deprive plaintiff of the equal protection of the laws of Oregon, to wit, the laws in relation to due and established tribunals, their organization, procedure and course of justice, and particularly those relating to the commitment of persons alleged to be mentally ill; and further conspired to deprive plaintiff of those

rights provided under the Constitution and laws of the United States and particularly those set forth in paragraph II herein, and conspired to impede, hinder, obstruct and defeat the due course and due process of law and justice in the State of Oregon; and further conspired to deprive plaintiff of the rights, privileges and immunities secured by the Constitution and laws of the United States extended to citizens of the United States and particularly those set forth in paragraph II herein; that all of said acts and those set forth throughout this complaint were committed by defendants, and each of them, while acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and were not committed in their individual capacity.

VIII.

In furtherance of the object of the aforesaid conspiracy, defendants Halden and Hansen both acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and in wilful, malicious, intentional and discriminating misuse of their authority, that of their subordinates, and of other agencies of the State of Oregon, including the Circuit Court of Multnomah County, and Morningside Hospital, wilfully acting in concert with each other and with the other defendants, by themselves, their agents, servants and subordinates, each and all procuring, aiding and encouraging the other defendants, from January, 1952, up to and including on or about the 18th day of June, 1956, did purposely and systematically and intentionally

discriminate against plaintiff and subjected him to inequality of treatment in the following particulars which were not privileged or compelled by law:

1. Forcibly taking the plaintiff into custody on or about the 10th day of January, 1952, and again on or about the 5th day of August, 1952, without first informing plaintiff of the charges against him or of the nature of the proceedings with which he was confronted and a refusal to exhibit a citation which was in their custody;

2. Wilful deprivation of plaintiff's rights to select a physician of his own choice and direct contravention of the Laws of the State of Oregon;

3. Wilful refusal on or about the 10th day of January, 1952, and again on the 5th day of August, 1952, to permit plaintiff to call or communicate with his counsel in time for said counsel to appear in his behalf despite the fact that he was under the custody and control of said defendants;

4. Wilful failure to perform their duty to summon the District Attorney for Multnomah County or an Assistant District Attorney to be present at the hearing concerning plaintiff's competency and at a second hearing concerning his proposed commitment;

5. Wilful refusal to permit plaintiff to summon witnesses in his own behalf and wilful refusal to give him an opportunity to prepare a defense to the charges against him;

6. In intentionally confining plaintiff in an enclosure where persons charged with a crime were also incarcerated in direct violation of Oregon Law despite the fact that a suitable place for plaintiff's comfortable, safe and human confinement was available;

7. In threatening, coercing and intimidating plaintiff to prevent plaintiff from making any objections to his illegal detention;

8. In threatening and intimidating and coercing plaintiff from exercising and availing himself of due process and of the due course of the law;

9. In wilful failure to act in good faith and pursuant to the mandate of State law. In the wilful violation of the order of the Circuit Court of Multnomah County, Oregon, issued on or about August 4, 1952, requiring that the plaintiff be brought before said Court but instead defendants forcefully took plaintiff to a place of detention;

10. In the wilful refusal of defendants to communicate to the Circuit Court of Multnomah County, Oregon, that the order of the Court had been ignored and plaintiff was being held by them in a place of detention against his wishes;

11. In falsely filing a return of citation stating that they had followed the order of the Circuit Court of Multnomah County as set forth above;

12. In intentionally suppressing the facts regarding plaintiff's illegal detention from the proper

authorities and falsely assuring plaintiff that his liberty would not be impaired in any way by his attendance at the hearing conducted on or about January 10, 1952, despite the fact that said defendants were fully conversant with the purpose of said hearing;

13. In wilfully participating without objection or remonstrance of any kind despite the fact that it was within their power to remonstrate in the hearing conducted on or about January 10, 1952, as aforesaid which hearing was wholly devoid of due process and which was convened under statutes unconstitutional and void;

14. In causing all of that money and property in plaintiff's possession to be forcefully extracted from his person on or about August 5, 1952, thereby depriving plaintiff of the means of communicating or employing counsel or any other person to appear in his behalf;

15. By directing plaintiff to remain silent and refuse to testify in his own behalf at the hearing which was held on or about the 10th day of January, 1952, in the Circuit Court of Multnomah County and by also informing plaintiff that it was unnecessary for him to obtain legal representation despite the fact that defendants knew that if plaintiff were not permitted to summon counsel that no one would appear at said hearing to protect or represent his interests;

16. By assisting and forcefully removing plaintiff from the Courtroom on January 10, 1952,

despite the fact that said defendants knew that various witnesses were preparing to testify adversely to plaintiff and that he would be given no opportunity to confront or hear the testimony of said witnesses;

17. In refusing to assist in the restoration of the money nad property forcibly seized from plaintiff's person on or about the 5th day of August, 1952;

18. In the wilful coercion and intimidation of plaintiff to prevent him from exercising his rights under the Constitution of the United States and the laws of the State of Oregon.

IX.

In furtherance of the objects of the aforesaid conspiracy defendant, Dr. George F. Keller, acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and in wilful, malicious, intentional and discriminating misuse of his authority and that of other agencies of the State of Oregon including the Circuit Court for Multnomah County and Morningside Hospital and wilfully acting in concert with the other defendants, each and all procuring, aiding and encouraging the other defendants, from January, 1952, up to and including on or about the 18th day of June, 1956, did purposely and systematically and intentionally discriminate against plaintiff and subject him to inequality of treatment in the following respects which were neither privileged nor compelled by law:

1. That although said physician had been specifically ordered by the Circuit Judge of Multnomah County, Oregon, to make an adequate medical and psychological examination of plaintiff as a preliminary and as an adjunct of the hearing conducted on or about the 10th day of January, 1952, concerning plaintiff's competency, said physician wholly failed and refused to comply with said order and instead made only a superficial examination;

2. That despite the fact that said physician realized that he did not have sufficient data to form an intelligent judgment concerning plaintiff's mental competency he nevertheless certified under oath to the Circuit Court that the plaintiff was incompetent despite the fact that a complete examination would have revealed that the contrary was the case; .

3. By intentionally signing a certificate containing information allegedly gathered concerning plaintiff by defendant Dr. Keller, or his subordinates, although he knew this information was extremely limited and he had made no effort to verify the same;

4. By signing and verifying a statement concerning the plaintiff which contained numerous inaccuracies;

5. By refusing and ignoring plaintiff's request at the time of said hearing that he be given an adequate mental examination as a necessary preliminary to any adjudication concerning his competency;

6. By suppressing the facts regarding plaintiff's illegal detention from the proper authorities and participating in a hearing without remonstrance or objections of any kind despite the fact that it was within the power of said defendant to object when it became apparent that said hearing was wholly lacking in due process and plaintiff was being denied the privileges and immunities and the equal protection of the laws available to all citizens under the Constitution of the United States;

7. In failing to remonstrate or object in any fashion despite the fact that it was within his power to object or remonstrate when plaintiff was given no opportunity whatever to cross-examine witnesses, was excluded from hearing the testimony of said witnesses, was given no opportunity to summon counsel or representative in his behalf or to testify, in any way except for a few preliminary statements, and that the District Attorney of Multnomah County was not present despite the statutory mandate to the contrary;

8. By wilfully participating without objection or remonstrance whatever despite the fact that it was in his power to remonstrate or object at a hearing which was convened under a statute unconstitutional and void;

9. By refusing to make an examination of plaintiff while he was held at Morningside Hospital despite the fact that it was his duty to do so on or about the 5th day of August, 1952;

10. By refusing to immediately release plaintiff while he was held at said Morningside Hospital since he was apprised of the fact that plaintiff had been confined under proceedings wholly void;

11. By refusing to direct that defendants Halden and Hansen deliver plaintiff to the Circuit Court of Multnomah County rather than to Morningside Hospital after he knew either personally or by and through his agents acting within the scope of their employment that defendants Halden and Hansen had wilfully disobeyed the order of the Court directing that said plaintiff be delivered to the Circuit Court rather than to Morningside Hospital on or about August 5, 1952.

X.

In furtherance of the object of the aforesaid conspiracy, defendant Dr. Donald E. Wair, acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and in wilful, malicious, intentional and discriminating misuse of his authority, that of his subordinates and other agents of the State of Oregon, including the Circuit Court for Multnomah County, wilfully acting in concert with the other defendants, by themselves, their agents, servants, and subordinates, each and all procuring, aiding and encouraging the others from on or about August 5, 1952, up to and including on or about the 18th day of June, 1956, in the State of Oregon:

1. Wilfully and intentionally forcefully restraining plaintiff from leaving the Oregon State Hospi-

tal, Pendleton, Oregon, despite the fact that he knew that defendant was being held illegally;

2. Wilfully and intentionally forcefully restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite that fact that he knew plaintiff was not suffering from mental illness;

3. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorities;

4. By refusing to permit plaintiff to correspond or communicate with appropriate authorities, except to a limited extent;

5. In threatening, coercing and intimidating plaintiff in an effort to force him to dismiss a civil action which plaintiff had filed in the Circuit Court of Multnomah County, Oregon.

XI

That the aforesaid acts on the part of the defendants and each of them, resulted in the confinement of plaintiff to the Oregon State Hospital, Pendleton, Oregon, from on or about the 5th day of August, 1952, to and including on or about the 23rd day of October, 1952, against his express wishes and to his great embarrassment and mental anguish and caused him to lose his wages in the sum of \$1200.00 for that period of time.

XII.

That as a result of the foregoing acts of the defendants, and each of them, plaintiff was harrassed,

intimidated, coerced, feared serious bodily harm, and suffered grievous humiliation, indignity and nervous shock, and was deprived of his constitutional rights and his rights under the laws of the United States as set forth hereinabove to his damage in the sum of \$100,000.00.

XIII.

Defendants, and each of them, in the acts above stated acted wantonly, maliciously and arbitrarily, by virtue whereof plaintiff is entitled to punitive damages in the sum of \$100,000.00.

Wherefore, plaintiff prays for judgment against the defendants, and each of them, for the sum of \$101,200.00 as actual damages; and the sum of \$100,000.00 as punitive damages; and for his costs and disbursements incurred herein.

ROTH & TILBURY,

/s/ ROGER TILBURY,

Of Attorneys for Plaintiff.

[Endorsed]: Filed March 4, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS SECOND AMENDED COMPLAINT

The defendant Dr. Donald E. Wair moves the court for an order as follows:

1. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because said second amended complaint fails to state a claim against said defendant upon which relief can be granted.

2. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because the claim alleged in said second amended complaint is barred by the applicable Oregon statute of limitations.

ROBERT Y. THORNTON,
Attorney General of Oregon,

/s/ PETER L. HERMAN,
Assistant Attorney General, Attorneys for the Defendant Dr. Donald E. Wair.

[Endorsed]: Filed March 12, 1957.

[Title of District Court and Cause.]

**MOTION OF DEFENDANT DR. G. F. KELLER
TO DISMISS SECOND AMENDED COMPLAINT**

Now comes defendant Dr. G. F. Keller and moves the court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing the second amended complaint upon the following grounds:

1. That said second amended complaint fails to state an enforceable claim against said defendant upon which relief can be granted by this court;

2. That this court lacks jurisdiction over the subject matter of this action;

3. That the claim alleged is barred by the applicable Oregon statute of limitations.

/s/ HUGH L. BIGGS,

/s/ CLEVELAND C. CORY,

Attorneys for Defendant Dr.
G. F. Keller.

Service admitted.

[Endorsed]: Filed March 22, 1957.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS C. H. HALDEN
AND DR. F. SYDNEY HANSEN TO DIS-
MISS SECOND AMENDED COMPLAINT

Come now defendants C. H. Halden and Dr. F. Sydney Hansen and move the Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing the second amended complaint upon the following grounds:

1. That the claim alleged is barred by the applicable Oregon statute of limitations.

2. That the second amended complaint fails to state an enforceable claim against said defendants upon which relief can be granted by this Court.

/s/ WILLIAM M. LANGLEY,
District Attorney, Multnomah County, Attorney for
Defendants C. H. Halden and Dr. F. Sydney
Hansen.

Points and Authorities

1. Plaintiff's claim is based upon the Federal Civil Rights laws. The statute of limitations applicable is the State of Oregon statute of limitations on tort, 42 USCA 1983, note 134. The state statute on tort is two years, ORS 12.110. An action is commenced when the defendant is served with summons, ORS 12.020. According to plaintiff's second amended complaint, his claim arose January 10, 1952, and not later than October 23, 1952. When a state statute of limitations as an integral part thereof specifies what must be done, the courts hold the statute is not tolled until action is brought as the statute directs, *Glebus vs. Fillmore*, 104 F. Supp. 902. Defendants were not served with summons until December 19, 1956.

2. The problem is not whether state law has been violated but whether an inhabitant of a state has been deprived of a federal right by one who acts under color of state law, *Screws vs. U. S.*, 325 US 91. The legal authority for mentally ill proceedings taken against plaintiff by the State of Oregon is set

forth in Chapter 426, O.R.S. All acts done by the within defendants were pursuant to order of the Circuit Court of Multnomah County, Oregon. The Federal Civil Rights laws do not authorize a claim against the within defendants, 232 F. 2d 288.

/s/ WILLIAM M. LANGLEY.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 10, 1957.

The United States District Court
for the District of Oregon

Civil No. 7351

ADOLPH G. HOFFMAN,

Plaintiff,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. F. SYDNEY HAN-
SEN,

Defendants.

JUDGMENT OF DISMISSAL

The defendants, C. H. Halden, Dr. Donald E. Wair, Dr. G. F. Keller and Dr. F. Sydney Hansen, having filed motions, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing the second amended complaint for the rea-

sons stated therein, including the ground that said second amended complaint fails to state a claim against each of the said defendants upon which relief can be granted, and the said motions having regularly come on for hearing before the court, plaintiff appearing by his attorney, Roger G. Tilbury, defendants Halden and Hansen appearing by their attorney, Robert Christ, and defendant Keller appearing by his attorneys, Hart, Spencer, McCulloch, Rockwood & Davies (Geoffery C. Hazard, of counsel), and the court having heard arguments of counsel and having considered the written briefs filed in support and in opposition to said motions, and the court being fully advised and being of the opinion that the several defendants' motions to dismiss on the ground that the second amended complaint fails to state a claim upon which relief can be granted should be sustained; it is

Ordered and Adjudged that the motions of the defendants Halden, Wair, Keller and Hansen to dismiss the second amended complaint on the ground that said pleading fails to state a claim upon which relief can be granted against said defendants, be and the same are hereby granted and the said second amended complaint is hereby dismissed; and it is further

Ordered and Adjudged that plaintiff take nothing by reason of this action, and the same is hereby dismissed in favor of the said defendants Halden, Wair, Keller and Hansen.

Done and dated this 14th day of October, 1957.

/s/ WILLIAM G. EAST,

United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 15, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court, and to C. H. Halden, Dr. Donald E. Wair, Dr. G. F. Keller and Dr. R. Sydney Hansen, defendants and to Hart, Spencer, McCulloch, Rockwood & Davies, attorneys for defendant Dr. G. F. Keller and to Leo Smith, District Attorney for Multnomah County and attorney for C. H. Halden and Dr. F. Sydney Hansen, and to Robert Thornton, Attorney General for Oregon and attorney for Dr. Donald E. Wair.

You and each of you will please take notice that Adolph G. Hoffman, the plaintiff above named, has hereby appealed to the United States Court of Appeals for the 9th Circuit thereof, from the judgment of dismissal made and entered on the 14th day of October, 1957, wherein the Court sustained the motions of defendants and dismiss the Second Amended Complaint on the grounds that the pleading purportedly fails to state a claim upon which relief can be granted against said defendants and

from the further order that the plaintiff take nothing by reason of this action, and dismissing the same in favor of defendants Halden, Wair, Keller and Hansen.

Dated at Portland, Oregon, this 21st day of October, 1957.

ALEXANDER, BUEHNER &
TILBURY,

By /s/ ROGER TILBURY,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 22, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Order dismissing for failure to prosecute; Motion to set aside order of dismissal; Order vacating order of dismissal; Amended complaint; Order dismissing amended complaint; Order dismissing amended complaint; Second amended complaint; Motion to dismiss second amended complaint; Amended motion to dismiss second amended complaint; Motion of Defendant Dr. G. F. Keller to dismiss second amended complaint; Motion of De-

endants C. H. Halden and Dr. F. Sydney Hansen to dismiss second amended complaint; Judgment of dismissal; Notice of appeal; Bond on costs on appeal; Designation of contents of record on appeal; Designation of additional portions of record on appeal of appellee Dr. G. F. Keller; Designation of additional portion of record on appeal of appellee Dr. Donald E. Wair and Docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7351, in which Adolph G. Hoffman is appellant and plaintiff and C. H. Halden, Dr. Donald E. Wair, Dr. G. F. Keller and Dr. F. Sydney Hansen are the appellees and defendants; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and the appellees, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of November, 1957.

[Seal]

R. DeMOTT,
Clerk,

By /s/ V. O. BISHOP,
Chief Deputy.

[Endorsed]: No. 15782. United States Court of Appeals for the Ninth Circuit. Adolph G. Hoffman, Appellant, vs., C. H. Halden, Dr. Donald E. Wair, Dr. G. G. Keller and Dr. R. Sydney Hansen, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed November 14, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15782

ADOLPH G. HOFFMAN,

Appellant,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. F. SYDNEY HAN-
SEN,

Appellees.

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The following portions of the record and proceedings are in the opinion of Appellant material to the consideration of the appeal:

1. Second amended complaint filed March 4, 1957;
2. Motion of defendant Dr. Donald E. Wair to dismiss the Second amended complaint filed March 12, 1957;
3. Motion of defendant Dr. G. F. Keller to dismiss the Second amended complaint filed March 22, 1957;
4. Motion of defendant Dr. F. Sydney Hansen and C. H. Halden to dismiss the Second amended complaint filed April 10, 1957;

5. Judgment of dismissal filed October 14th, 1957.

6. Notice of appeal.

ALEXANDER, BUEHNER &
TILBURY,

By /s/ ROGER TILBURY,
Counsel for Appellant.

Affidavit of Service by Mail attached.

Receipt of copy acknowledged.

[Endrosed]: Filed Oct. 24, 1957.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Points:

Appellant herein pursuant to rule 75(D) of the Federal Rules of Civil Procedure hereby designates the points on which appellant intends to rely on appeal.

1. The United States District Court erred in entering a judgment of dismissal of the Second Amended Complaint on the ground that said pleading fails to state a claim upon which relief can be granted against said defendants. Appellant will contend that the complaint clearly sets forth a cause of

action on the part of defendants by means of a continuing conspiracy to deprive him of the equal protection of the laws while acting under color and pretense of Oregon law. This constitutes a clear violation of the Civil Rights Law. Appellant will contend that the Court erred in not giving him an opportunity to substantiate these charges in denying him an opportunity to prove these facts to a jury of his peers.

Respectfully submitted,

ALEXANDER, BUEHNER &
TILBURY,

By /s/ ROGER TILBURY,
Counsel for Appellant.

[Endorsed]: Filed Oct. 24, 1957.



No. 15782

United States
Court of Appeals
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. R. SYDNEY HAN-
SEN,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK



No. 15782

United States
Court of Appeals
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. R. SYDNEY HAN-
SEN,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court
for the District of Oregon.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. Civ. 7351

ADOLPH G. HOFFMAN,

Plaintiff,

vs.

ASHBY C. DICKSON, Judge; C. H. HALDEN;
F. H. DAMMASCH, M.D., and G. F. KELLER, MD.; JOHN DOE, JANE DOE and
RICHARD ROE,

Defendants.

COMPLAINT

Comes now the plaintiff, Adolph G. Hoffman, and deposes and says as a cause of action against the above-named defendants, and each of them:

I.

That on or about January 10, A.D. 1952, they did enter into a conspiracy to deprive said Plaintiff, Adolph G. Hoffman, of legal and constitutional rights and safeguards, and did thereby cause him to be deprived of his liberty and caused to be confined in the Eastern Oregon State Hospital at Pendleton, Oregon, for a period of seventy-nine days and some odd hours, and that such incarceration took place without due process of law.

II.

That, in violation of the general laws of the State of Oregon, and the Constitution of the State of

Oregon, the Constitution of the United States of America, and certain Civil Rights Statutes of the United States of America, a hearing was held in the court of Ashby C. Dickson, Judge of the Probate Court, County of Multnomah, State of Oregon, at which time the above-named plaintiff, Adolph G. Hoffman, was adjudged mentally ill, on the strength, in part, of affidavits, wholly or in part false, and signed and attested by the above-named defendants, F. H. Dammasch, M.D., and G. F. Keller, M.D.

III.

That, in violation of the general laws of the State of Oregon, and specifically Chapter 571, Oregon Laws of 1949, and the constitution of the United States, the above-named defendant, Ashby C. Dickson, as presiding judge of the above-named court of the County of Multnomah, State of Oregon, did refuse to allow the above-named plaintiff, Adolph G. Hoffman, the right to be represented by counsel.

IV.

That the above-named defendant, Ashby C. Dickson, accepted testimony, as a matter of record, and to the detriment of said plaintiff, from witnesses not present in court.

V.

That the above-named defendant, Ashby C. Dickson, did not require all of the complaining witnesses to be present at the alleged hearing.

VI.

That the above-named plaintiff, Adolph G. Hoffman, and/or his counsel were denied the right to cross-examine witnesses appearing against him.

VII.

That the above-named defendant, C. H. Halden, flimflammed and bamboozled and took advantage of the lack of legal knowledge of the above-named plaintiff, Adolph G. Hoffman, by convincing him beforehand that nothing would happen to him as a result of the above-said alleged hearing if he would keep silent and allow said C. H. Halden to speak for him.

VIII.

That the above actions by defendants and each of them caused plaintiff great and prolonged mental and physical anguish.

Wherefore, plaintiff, Adolph G. Hoffman, prays the court for relief and judgment against the above-named defendants and each of them, in actual damages to the amount of \$1,200.00, with a further amount of \$1,500,000.00 as punitive and exemplary damages, and for costs, and for any further relief which the court may deem proper and fitting.

/s/ **ADOLPH G. HOFFMAN,**
Plaintiff.

Duly verified.

[Endorsed]: Filed January 16, 1954.

[Title of District Court and Cause.]

ORDER DISMISSING CAUSE FOR
FAILURE TO PROSECUTE

August 10, 1954

Now at this day It Is Ordered that this cause be,
and is hereby, dismissed for failure to prosecute.

McC.

[Title of District Court and Cause.]

MOTION

Comes now plaintiff and moves the Court for an order to set aside the order of involuntary dismissal with prejudice entered on August 10, 1954, on the grounds and for the reasons set forth in the affidavit accompanying this motion and as provided in Federal Rules of Procedure, Rule 17, 55, 60(6) and ORS 12.160.

ROTH & TILBURY,

/s/ ROGER TILBURY,

Of Attorneys for Plaintiff.

[Endorsed]: Filed October 8, 1956.

[Title of District Court and Cause.]

ORDER VACATING ORDER OF DISMISSAL
(Nov. 1, 1956)

On motion of Roger Tilbury, of the firm of Roth & Tilbury, now based on evidence of the plaintiff and representations of counsel the order of August 10th, 1954, dismissing this cause for failure to prosecute is vacated and set aside.

Notified.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now plaintiff and for an amended cause of action against defendants, and each of them, in accordance with Federal Rule of Civil Procedure No. 15 complains and alleges as follows:

I.

That plaintiff is a citizen of the United States of America and a resident of Multnomah County within this judicial District; that this Court has jurisdiction and under the provisions of U.S.C. Title 28, Section 1331, in that the cause of action herein arises under the Constitution of the United States and the statutes of the United States, to wit: U.S.C. Title 42, Section 1983, and under Title 28, Section 1343; the United States Constitution and the 14th Amendment.

II.

That at all times herein mentioned Dr. F. Sydney Hansen was and still is the County Health Officer of Multnomah County, Oregon.

III.

That at all times herein mentioned C. H. Halden was a Deputy County Health Officer of Multnomah County and acted as an agent of defendant Dr. F. Sydney Hansen and within the scope of his agency.

IV.

That at all times herein mentioned Dr. Donald E. Wair was and still is the Superintendent of the Oregon State Mental Hospital at Pendleton, Oregon.

V.

That at all times herein mentioned Dr. George F. Keller was and still is a duly licensed physician within the State of Oregon.

VI.

That on or about the 10th day of January, 1952, defendants C. H. Halden and Dr. F. Sydney Hansen acting under the color of the Oregon law relating to the commitment of persons charged with being mentally ill wilfully and intentionally deprived plaintiff of his rights, privileges and immunities secured by the Constitution of the United States and the laws of the State of Oregon by depriving him of his liberty without due process of law by participat-

ing in connection with a hearing which was held in the Circuit Court of the County of Multnomah, State of Oregon, on or about the 10th day of January, 1952, and in connection with the subsequent confinement of the plaintiff to the Oregon State Hospital at Pendleton, Oregon, from the period of on or about the 5th day of August, 1952, to and including the 23rd day of October, 1952, in the following particulars, among others, to wit:

1. By assuring plaintiff that his liberty or his rights would not be impaired in any way by the plaintiff's attendance at the hearing conducted in the Circuit Court of Multnomah County on or about the 10th day of January, 1952.

2. By refusing to permit plaintiff to call for his attorney in sufficient time for said attorney to appear at the said hearing in order to afford plaintiff representation in any respect.

3. By failing to summon the District Attorney or permit plaintiff to summon the District Attorney as required by the statute of the State of Oregon.

4. By failing to give plaintiff adequate notice of the nature of the hearing which was conducted on the aforementioned date.

5. By failing to apprise plaintiff of the nature of the hearing.

6. By failing to afford plaintiff the opportunity to summon witnesses in his own behalf when it became apparent that plaintiff would be given no op-

portunity to cross-examine witnesses which had been summoned against him.

7. By failing to remonstrate when plaintiff was excluded from hearing the evidence which was offered concerning his sanity.

8. By failing to obey the order of the Circuit Court of the County of Multnomah, State of Oregon, entered on October 4, 1952, which specifically directed that plaintiff be brought before said Court for further hearings but instead took plaintiff to a hospital where he was confined against his wishes.

9. By counseling plaintiff that it was unnecessary for him to obtain legal representation in connection with said hearing and by counseling plaintiff to remain silent and refuse to testify in his own behalf.

10. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorities.

VII.

That on or about the 10th day of January, 1952, defendant, Dr. George F. Keller, acting under the color of the Oregon law relating to the commitment of persons charged with being mentally ill, wilfully and intentionally deprived plaintiff of his rights, privileges and immunities secured by the Constitution of the United States and the laws of the State of Oregon by depriving plaintiff of his liberty without due process of law by participating in connec-

tion with a hearing which was held in the Circuit Court of the County of Multnomah, State of Oregon, on or about the 10th day of January, 1952, and in connection with the subsequent confinement of plaintiff to the Oregon State Hospital at Pendleton, Oregon, from the period of on or about the 5th day of August, 1952, to and including the 23rd day of October, 1952, in the following particulars, among others, to wit:

1. By failing to remonstrate when plaintiff was excluded from hearing the evidence which was offered concerning his sanity.

2. By failing to remonstrate when it became apparent that plaintiff would be given no opportunity to cross-examine witnesses which had been summoned against him.

3. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorities.

4. That although said physician had been specifically ordered by the County Judge of the County of Multnomah, State of Oregon, to make an adequate medical examination concerning the alleged mental illness of plaintiff said physician failed to perform the duties required of him in connection with said order.

5. By signing and verifying the certificate together with Dr. Dammasch containing numerous statements which were not true.

6. By failing to remonstrate when it became apparent that plaintiff would not be given the hearing provided by the law of the State of Oregon; despite the fact that said defendant was fully conversant with the law relating to persons being mentally ill.

VIII.

That on or about the 6th day of October, 1952, defendant Dr. Donald E. Wair, acting under the color of the Oregon law relating to the commitment of persons charged with being mentally ill, wilfully and intentionally deprived plaintiff of his rights, privileges and immunities secured by the Constitution of the United States and the laws of the State of Oregon by depriving plaintiff of his liberty without due process of law by participating in connection with a hearing which was held in the Circuit Court of the County of Multnomah, State of Oregon, on or about the 10th day of January, 1952, and in connection with the subsequent confinement of plaintiff to the Oregon State Hospital at Pendleton, Oregon, from the period of on or about the 5th day of August, 1952, to and including the 23rd day of October, 1952, in the following particulars, among others, to wit:

1. By failing to immediately release plaintiff after he was apprised of the fact that plaintiff had been confined to said hospital without due process of law.

2. By refusing to release plaintiff from said hospital until such time as plaintiff signed a release in

connection with a case filed by plaintiff against James Peake in the Circuit Court of the County of Multnomah despite the fact that it was apparent to said Doctor that plaintiff was not suffering from mental illness.

3. By refusing to apprise the proper authorities that plaintiff had been confined without due process of law.

IX.

That the aforesaid acts on the part of the defendants, and each of them, resulted in the confinement of plaintiff to the Oregon State Hospital at Pendleton, Oregon, against his express wishes and to his great embarrassment and mental anguish and caused him to lose his wages in the sum of \$1,200.00 for that period of time.

X.

That as a result of the foregoing acts of the defendants, and each of them, plaintiff was intimidated, feared serious bodily harm, and suffered humiliation, indignity and nervous shock, and was deprived of his constitutional rights as set forth hereinabove to his damage in the sum of \$25,000.00. The defendants, and each of them, acted wantonly, maliciously and arbitrarily by virtue whereof plaintiff is entitled to punitive damages in the sum of \$100,000.00.

Wherefore, plaintiff prays for judgment against the defendants, and each of them, for the sum of \$26,200.00 as actual damages; the sum of \$100,-

000.00 as punitive damages; and for his costs and disbursements incurred herein.

ROTH & TILBURY,

/s/ ROGER TILBURY,

Of Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed December 18, 1956.

[Title of District Court and Cause.]

ORDER DISMISSING
AMENDED COMPLAINT

The motion to dismiss of Dr. F. Sydney Hansen and the motion to dismiss of C. H. Halden directed against plaintiff's amended complaint coming regularly before this court, the said defendants appearing by William M. Langley, their attorney, and the plaintiff appearing by his attorney, Roger Tilbury, and the court not being fully advised concerning defendants' contention that the within action is barred by the statute of limitations, and, therefore, not ruling thereon, and the court being fully advised concerning defendants' contention that the within-amended complaint fails to state a claim upon which relief can be granted,

It Is Hereby Ordered that plaintiff's amended complaint be dismissed upon the ground that it fails to state a claim upon which relief can be granted.

It Is Further Ordered that the plaintiff may have fifteen (15) days in which to file a second amended complaint.

Dated this 21st day of January, 1957.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

ORDER DISMISSING AMENDED
COMPLAINT WITH LEAVE TO AMEND

The above-entitled action having come on for decision on the motion to dismiss the amended complaint of the defendant Dr. Donald E. Wair, and the Court being of the opinion said motion is well taken, Now, Therefore,

It Is Hereby Ordered that the amended complaint herein be and the same is hereby dismissed as against the defendant Dr. Donald E. Wair, with leave to plaintiff to amend if so advised.

Dated this 21st day of February, 1957, at Portland, Oregon.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed March 1, 1957.

[Title of District Court and Cause.]

AMENDED MOTION TO DISMISS
SECOND AMENDED COMPLAINT

The defendant Dr. Donald E. Wair moves the court for an order as follows:

1. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because said second amended complaint fails to state a claim against said defendant upon which relief can be granted.

2. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because the claim alleged in said second amended complaint is barred by the applicable Oregon statute of limitations.

3. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because sections 1985 and 1986 of Title 42, U.S.C.A., are unconstitutional and void.

ROBERT Y. THORNTON,
Attorney General of Oregon.

/s/ PETER S. HERMAN,
Assistant Attorney General, Attorneys for the Defendant Dr. Donald E. Wair.

[Endorsed]: Filed March 15, 1957.

[Endorsed]: No. 15782. United States Court of Appeals for the Ninth Circuit. Adolph G. Hoffman, Appellant, vs. C. H. Halden, Dr. Donald E. Wair, Dr. G. F. Keller and Dr. R. Sydney Hansen, Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed November 14, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States
COURT OF APPEALS
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F.
KELLER and DR. F. SYDNEY HANSEN,

Appellees.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, Judge

ALEXANDER, BUEHNER & TILBURY,

ROGER TILBURY,

606 Executive Building,

Portland, Oregon,

For Appellant.

HART, SPENCER, MCCULLOCH, ROCKWOOD AND DAVIES,

CLEVELAND C. CORY,

1410 Yeon Building,

Portland, Oregon,

For Appellee Keller.

ROBERT Y. THORNTON, Attorney General of Oregon:

PETER L. HERMAN, Assistant Attorney General,

Salem, Oregon,

Supreme Court Building,

For Appellee Wair.

LEO SMITH, District Attorney for Multnomah County:

WILLIS A. WEST, Chief Civil Deputy,

Multnomah County Courthouse,

Portland, Oregon,

For Appellees Halden and Hansen.

FILED

FEB 25 1958

PAUL P. O'BRIEN, CL.

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United States
COURT OF APPEALS
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F.
KELLER and DR. F. SYDNEY HANSEN,

Appellees.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, Judge

JURISDICTION

This is an appeal from an order by Honorable William G. East, Judge, dated October 14, 1957 and entered October 15, 1957 dismissing appellant's second amended complaint upon the stated ground that the pleading failed to state a claim upon which relief could be granted against the appellees. Appellant filed notice of appeal October 22, 1957.

Jurisdiction was invoked under the United States Constitution and particularly Article I, Section 8, Article

IV, Section 4, Amendments XIII and XIV, and Laws of the United States, Title 18 U. S. C. 241, 242; Title 28 U. S. C. 1331 and 1343; Title 42 U. S.C. 1981-1988; Title 50 U. S. C. 203, which are commonly referred to as Civil Rights Laws.

PLEADING AND FACTS

Appellant's complaint states that from January 10, 1952 up to and including June 18, 1956 he was a victim of a continuing conspiracy by appellees to deprive him of constitutional and statutory rights and particularly those relating to equal protection of the laws, due process and the privileges and immunities clauses. Appellees are respectively Halden and Hansen, Deputy and County Health Officer of Multnomah County, Oregon; Wair, Superintendent of the Oregon State Mental Hospital, Pendleton, and Dr. Keller, a physician, who makes examinations in mental cases for the State. The complaint states that they acted under color and pretense of the Oregon laws in their capacities as state officers and not in their individual capacities (Tr. 5). The acts of appellees were done intentionally, maliciously, wilfully and appellant was selected for purposeful discrimination (Tr. 5-13). The acts were neither privileged nor compelled by law (Tr. 6-13). Specifically various appellees are charged with the following:

HALDEN AND HANSEN:

"1. Forcibly taking the plaintiff into custody on or about the 10th day of January, 1952, and again on or

about the 5th day of August, 1952, without first informing plaintiff of the charges against him or of the nature of the proceedings with which he was confronted and a refusal to exhibit a citation which was in their custody;

“2. Wilful deprivation of plaintiff’s rights to select a physician of his own choice in direct contravention of the Laws of the State of Oregon;

“3. Wilful refusal on or about the 10th day of January, 1952, and again on the 5th day of August, 1952, to permit plaintiff to call or communicate with his counsel in time for said counsel to appear in his behalf despite the fact that he was under the custody and control of said defendants;

“4. Wilful failure to perform their duty to summon the District Attorney for Multnomah County or an Assistant District Attorney to be present at the hearing concerning plaintiff’s competency and at a second hearing concerning his proposed commitment;

“5. Wilful refusal to permit plaintiff to summon witnesses in his own behalf and wilful refusal to give him an opportunity to prepare a defense to the charges against him;

“6. In intentionally confining plaintiff in an enclosure where persons charged with a crime were also incarcerated in direct violation of Oregon Law despite the fact that a suitable place for plaintiff’s comfortable, safe and humane confinement was available;

"7. In threatening, coercing and intimidating plaintiff to prevent plaintiff from making any objections to his illegal detention;

"8. In threatening and intimidating and coercing plaintiff from exercising and availing himself of due process and of the due course of law;

"9. In wilful failure to act in good faith and pursuant to the mandate of State law. In the wilful violation of the order of the Circuit Court of Multnomah County, Oregon, issued on or about August 4, 1952, requiring that the plaintiff be brought before said Court, but instead defendants forcibly took plaintiff to a place of detention;

"10. In the wilful refusal of defendants to communicate to the Circuit Court of Multnomah County, Oregon, that the order of the Court had been ignored and plaintiff was being held by them in a place of detention against his wishes;

"11. In falsely filing a return of citation stating that they had followed the order of the Circuit Court of Multnomah County as set forth above;

"12. In intentionally suppressing the facts regarding plaintiff's illegal detention from the proper authorities and falsely assuring plaintiff that his liberty would not be impaired in any way by his attendance at the hearing conducted on or about January 10, 1952, despite the fact that said defendants were fully conversant with the purpose of said hearing;

"13. In wilfully participating without objection or remonstrance of any kind despite the fact that it was within their power to remonstrate in the hearing conducted on or about January 10, 1952, as aforesaid which hearing was wholly devoid of due process and which was convened under statutes unconstitutional and void;

"14. In causing all of that money and property in plaintiff's possession to be forcibly extracted from his person on or about August 5, 1952, thereby depriving plaintiff of the means of communicating or employing counsel or any other person to appear in his behalf;

"15. By directing plaintiff to remain silent and refuse to testify in his own behalf at the hearing which was held on or about the 10th day of January, 1952, in the Circuit Court of Multnomah County and by also informing plaintiff that it was unnecessary for him to obtain legal representation despite the fact that defendants knew that if plaintiff were not permitted to summon counsel that no one would appear at said hearing to protect or represent his interests;

"16. By assisting and forcibly removing plaintiff from the Courtroom on January 10, 1952, despite the fact that said defendants knew that various witnesses were preparing to testify adversely to plaintiff and that he would be given no opportunity to confront or hear the testimony of said witnesses;

"17. In refusing to assist in the restoration of the money and property forcibly seized from plaintiff's person on or about the 5th day of August, 1952;

"18. In the wilful coercion and intimidation of plaintiff to prevent him from exercising his rights under the Constitution of the United States and the laws of the State of Oregon."

DR. KELLER:

"1. That although said physician had been specifically ordered by the Circuit Judge of Multnomah County, Oregon, to make an adequate medical and psychological examination of plaintiff as a preliminary and as an adjunct of the hearing conducted on or about the 10th day of January, 1952, concerning plaintiff's competency, said physician wholly failed and refused to comply with said order and instead made only a superficial examination;

"2. That despite the fact that said physician realized that he did not have sufficient data to form an intelligent judgment concerning plaintiff's mental competency he nevertheless certified under oath to the Circuit Court that the plaintiff was incompetent despite the fact that a complete examination would have revealed that the contrary was the case;

"3. By intentionally signing a certificate containing information allegedly gathered concerning plaintiff by defendant Dr. Keller, or his subordinates, although he knew this information was extremely limited and he had made no effort to verify the same;

"4. By signing and verifying a statement concerning the plaintiff which contained numerous inaccuracies;

“5. By refusing and ignoring plaintiff’s request at the time of said hearing that he be given an adequate mental examination as a necessary preliminary to any adjudication concerning his competency;

“6. By suppressing the facts regarding plaintiff’s illegal detention from the proper authorities and participating in a hearing without remonstrance or objections of any kind despite the fact that it was within the power of said defendant to object when it became apparent that said hearing was wholly lacking in due process and immunities and the equal protection of the laws available to all citizens under the Constitution of the United States;

“7. In failing to remonstrate or object in any fashion despite the fact that it was within his power to object or remonstrate when plaintiff was given no opportunity whatever to cross-examine witnesses, was excluded from hearing the testimony of said witnesses, was given no opportunity to summon counsel or representative in his behalf or to testify, in any way except for a few preliminary statements, and that the District Attorney of Multnomah County was not present despite the statutory mandate to the contrary;

“8. By wilfully participating without objection or remonstrance whatever despite the fact it was in his power to remonstrate or object at a hearing which was convened under a statute unconstitutional and void;

“9. By refusing to make an examination of plaintiff while he was held at Morningside Hospital despite the

fact that it was his duty to do so on or about the 5th day of August, 1952;

"10. By refusing to immediately release plaintiff while he was held at said Morningside Hospital since he was apprised of the fact that plaintiff had been confined under proceedings wholly void;

"11. By refusing to direct that defendants Halden and Hansen deliver plaintiff to the Circuit Court of Multnomah County rather than to Morningside Hospital after he knew either personally or by and through his agents acting within the scope of their employment that defendants Halden and Hansen had wilfully disobeyed the order of the Court directing that said plaintiff be delivered to the Circuit Court rather than to Morningside Hospital on or about August 5, 1952."

DR. WAIR:

"1. Wilfully and intentionally forcibly restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew that defendant was being held illegally;

"2. Wilfully and intentionally forcibly restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew plaintiff was not suffering from mental illness;

"3. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorities;

"4. By refusing to permit plaintiff to correspond or communicate with appropriate authorities, except to a limited extent;

“5. In threatening, coercing and intimidating plaintiff in an effort to force him to dismiss a civil action which plaintiff had filed in the Circuit Court of Multnomah County, Oregon.”

Because of these acts of appellees, appellant was confined to the Oregon State Hospital, Pendleton, Oregon from August 6, 1952 to October 23, 1952.

The individual appellees filed motions to dismiss (Tr. 14-18) and the Court granted the motions upon the ground that the pleading failed to “state a claim upon which relief can be granted.” (Tr. 19.)

STATEMENT OF THE CASE

The simple question presented is whether an individual who has been deprived of the equal protection of the laws, due process, and privileges and immunities by individuals acting under color of state law who have selected him for purposeful discrimination and victimization; who intentionally violated the order of the Circuit Court and the law of Oregon in many respects; who coerced and intimidated him to prevent him from exercising his constitutional rights; who directed him to remain silent and refuse to testify in his own behalf; who filed affidavits known to be false; who caused him to be imprisoned without due process; who refused to inform him of the charges against him and refused to allow him to summon his attorney or his witnesses; and who discriminated against him in many other particulars; has a cause of action under the Civil Rights law.

SPECIFICATIONS OF ERRORS

The District Court erred in granting appellees' motions to dismiss when appellant's complaint clearly set forth a violation of the Civil Rights Act.

ARGUMENT OF CASE

Title 42 USC Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 USC Section 1985 (2) provides:

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any ver-

dict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;”

Title 42 USC Section 1986 provides:

“Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action.”

Generally speaking Section 1983 has been applied to due process violations whereas Section 1985 has been applied to the denial of equal protection.

McShane v. Moldovan (CA 6), 172 F2d 1016, 1949.

Ortega v. Ragen (CA 7), 216 F2d 561, 1954, CD 349 US 940, 75 S. Ct. 786, 99 L. Ed. 1268.

They grant separate and distinct rights.

McShane v. Moldovan, *supra*.

Ortega v. Ragen, *supra*.

Bottone v. Lindsley (CA 10), 170 F2d 705, 1948.

Eaton v. Bibb (CA 7), 217 F2d 446, 1954.

Section 1983 requires the following:

1. An individual who acts "under color of any statute, ordinance, regulation, custom or usage of any State or Territory * * *." This the complaint specifically alleges. It is established that upon a motion to dismiss all allegations well pleaded must be considered true. There are numerous decisions which have held that in order to give rise to a violation the act must be done under color of State or Territorial Statute, ordinance, regulations, customs or usage, and not acting merely as private individuals.

Collins v. Hardyman, 341 US 651, 71 S. Ct. 937, 95 L. Ed. 253, 1951.

However in this case it is specifically stated that appellees acted under color of state law (Tr. 5). In any event the Supreme Court has held:

"Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State Law, is action taken 'under color of' State Law."

United States v. Classic, 313 US 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368.

Geach v. Moynahan (CA 7), 207 F2d 714, 1953.

Picking v. Pennsylvania R. Co. (CCA 3), 151 F2d 240, 1945.

Condra v. Leslie & Coal Co. (DC KY.), 101 F. Supp. 774, 1952.

While personal acts are excluded from the coverage of the Civil Rights Act, "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

McShane v. Moldovan (CA 6), 172 F2d 1016, 1021, 1949.

2. " * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof * * *" The complaint expressly states that appellant is a citizen of the United States and Oregon (Tr. 3).

3. * * * "to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured * * *"

The Supreme Court has stated that the Civil Rights Law extends broadly to a deprivation of the rights, privileges and immunities secured by the Constitution, and this includes the 14th Amendment, and such privileges and immunities as are secured by the due process and equal protection clauses as well as the privileges and immunities clause of the amendment.

Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, 1939.

Can it be doubted that the following acts are all violations of the due process clause:

1. to seize an individual and to threaten and intimidate him from making any objections to his illegal detention;

2. to refuse to inform him of the charges against him;

3. to refuse to permit him to call or communicate with his attorney;

4. to refuse to permit him to summon witnesses in his own behalf or to allow him to prepare any sort of defense;

5. to intentionally suppress the facts regarding his illegal detention from the proper authorities;

6. to force appellant to remain silent and refuse to testify in his own behalf;

7. to deprive him of all of his money and other property;

8. in intentionally violating the order of the Court which specifically directed that appellant be brought before the Judge, but instead taking him to a place of incarceration.

There is also a clear cut denial of equal protection as will be discussed more fully under Section 1985.

Title 42, Section 1985 (2) requires the following elements:

1. "If two or more persons * * *"

Here four persons cooperated.

2. "conspire * * *" This is specifically stated in the complaint. Under the fundamental rule this must be assumed to be true when a motion to dismiss is filed (Tr. 4-5).

3. "for the purpose of impeding, hindering, obstruct-

ing, or defeating, in any manner, the due course of justice in any State or Territory * * *

This is also specifically stated (Tr. 5).

4. "with intent to deny to any citizen * * *" The complaint alleges that appellant, Adolph Hoffman, is a citizen of the United States and Oregon (Tr. 3). It is also stated that appellees acted intentionally, wilfully, maliciously and purposefully (Tr. 5).

5. "the equal protection of the laws * * *,"

This is also specifically stated (Tr. 4).

Equal protection has been variously defined as follows:

1. 16 A - CJS Sec. 502, p. 297:

"It means, and is a guaranty, that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed;" citing:

State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422, 1947.

Smith v. State of Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, 1940.

At p. 299:

"It is intended to secure and safeguard equality of right and of treatment against intentional and arbitrary discrimination;"

Beauharnais v. People of the State of Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919, 1952.

Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 1921.

Sunday Lake Iron Co. v. Wakefield Township, 247
U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154, 1918.

2. 12 AJ, p. 129:

“It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty and property, and in the pursuit of happiness.”

3. *Lynch v. U.S.* (CA 6), 189 F2d 476, 479, 1951:

“It relates not only to right of protection from the officer himself, but also relates to right of protection due the prisoner by an arresting officer against injury by third persons. A culpable official’s inaction may also constitute a denial of equal protection.”

4. *Ex Parte Knapp*, 73 Id. 505, 254 P2d 411, 413, 1953:

“It means that equal protection and security shall be given to every person under like circumstances in his life, his liberty and his property and in the pursuit of happiness, and in the exemption from any greater burdens and charges than are equally imposed upon all others under like circumstances.”

It has been noted on many occasions that the “discriminatory exercise of a discretionary power vested is also a denial of equal protection of the laws.”

Ex Parte Bridges, (D.C. Cal.), 49 F. Supp. 292, 1943.

It will be seen that this is specifically what was de-

nied to Adolph Hoffman in this case. It is stated in the complaint that the various appellees "did purposely and systematically and intentionally discriminate against plaintiff and subjected him to inequality of treatment in the following particulars * * *" (Tr. 5-6, 9, 12).

All of the cases indicate that the essential element in any complaint for denial of equal protection of the laws is the element of purposeful discrimination between persons.

Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497, 1944.

Morgan v. Sylvester, (D.C. N.Y.), 125 F. Supp. 380, 1954; Aff. 220 F2d 758, CD 76 S. Ct. 112.

Morgan v. Null (D.C. N.Y.), 120 F. Supp. 803, 1954.

This is precisely what occurred. As stated in the complaint Adolph Hoffman was purposefully, systematically and intentionally discriminated against when deprived of the equal protection of the laws and denied the rights and privileges enjoyed by other citizens.

Most acts alleged in the amended complaint are violations of federal constitutional rights. Some relate to specific violations of Oregon law. It is true that the central inquiry is not whether state law has been violated, but whether a person has been deprived of his federal rights by one acting under color of state law.

Mueller v. Powell (CA 8), 203 F2d 797, 1953.

However, in determining the question whether appellant has a cause of action against state officials for violation of the appellant's federal civil rights, decisions

have held that the federal courts may resort to the requirements of the state law to ascertain the essential elements of false arrest.

Pollack v. City of Newark, New Jersey (D.C. N.J.), 147 F. Supp. 35, 1956.

In the construction of the pleading filed by appellant in this case certain fundamental rules are apparent. For example, various decisions have held:

1. A motion to dismiss for failure to state a claim should not be granted unless it appears a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.

Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271, 43 S. Ct. 540, 67 L. Ed. 977, 1923.

Sidebotham v. Robison (CA 9), 216 F2d 816, 1954.

Chicago and N.W.R. Co. v. First National Bank of Waukegan (CA 7), 200 F2d 383, 1952.

Keenen v. Looney (CA 10), 227 F2d 878, 1955.

Sherwin v. Oil City National Bank (CA 3), 229 F2d 835, 1956.

Byrd v. Bates (CA 5), 220 F2d, 1955 (and even then, the Court would not ordinarily dismiss the complaint except after affording every opportunity to plaintiff to state a claim upon which relief might be granted).

Fair v. U.S. (CA 5), 234 F2d 288, 1956.

Mullins v. Clinchfield Coal Corp. (D.C. Va), 128 F. Supp. 437, 1953, Aff. 227 F2d 881, CD 76 S. Ct. 1048, 351 U.S. 982, 100 L. Ed. 1496. (Action should not be dismissed upon pleadings where there is any reasonable possibility that plaintiff, within and without complaint may establish by evidence facts which would entitle her to relief).

Moore's Federal Practice 2d Ed, Section 8.13, p. 1653.

2. In determining the sufficiency of the complaint, the material facts are considered in the light most favorable to plaintiff.

Lewis v. Brautigam (CA 5), 227 F2d 124, 1950.
 Dunn v. Gazzola (CA 1), 216 F2d 709, 711, 1954.
 Ortega v. Ragan (CA 7), 216 F2d 561, 563, 1954.

Barron and Holtzoff, Federal Practice and Procedure, Volume 1, Section 356, page 644:

“The motion should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. The test is whether in the light most favorable to plaintiff, and with every intentment regarded in his favor, the complaint is sufficient to constitute a valid claim.”

3. Complaint should be given a liberal construction.

Eaton v. Bibb (CA 7), 217 F2d 446, CD 76 S. Ct. 199, 1954.

Cool v. International Shoe Co. (CCA 8), 142 F2d 318, 1944.

Tobin v. Chambers Construction Co. (D.C. Neb.), 15 F.R.D. 47, 1952.

4. Courts look with disfavor upon the practice of terminating litigation by dismissing the complaint for insufficiency of statement.

Winget v. Rockwood (CCA 8), 69 F2d 326.

Garcia v. Hilton Hotels, International (D.C. Puerto Rico), 97 F. Supp. 5, 1951.

5. If there are multiple counts the motion will be denied if any of the counts is sufficient to sustain the action.

Bleecker v. Drury (D.C. N.Y.), 3 F.R.D. 325, 1944.

Barron and Holtzoff, Federal Practice and Procedure, Volume 1, Section 356.

It is well settled that when a motion to dismiss is filed it must be assumed that all well pleaded facts are true.

Federal Life Ins. Co. v. Ettman (CCA 8), 120 F2d 837, CD 314 U.S. 660, 86 L. Ed. 529, 62 S. Ct. 115.

MidWest Haulers v. Brady (CCA 6), 128 F2d 496, 1942.

Vilter Mfg. Co. v. Loring (CCA 7), 136 F2d 466, 1943.

Riley v. Dun & Bradstreet, Inc. (CA 6), 172 F2d 303, 1949.

As stated in Cyclopedia, Federal Procedure, Volume 5, Section 1593:

“For the purpose of a motion to dismiss under Rule 12(b) all the well pleaded facts appearing in the complaint and exhibits as supplemented by bill of particulars, are taken to be true for the purpose of the motion. The making of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted has the effect of admitting existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Putting it in another way, on a motion to dismiss a complaint on the ground of not stating a cause of action the ability of plaintiff to prove all its fact averments must be assumed.”

Furthermore plaintiff is not required to plead all the

evidentiary facts upon which he intends to rely at the trial in order to avoid a dismissal for failure to state a cause of action.

Butcher v. United Electric Coal Co. (CA 7), 174 F2d 1003, 1949.

This Court in discussing the function of a motion to dismiss stated in *Gruen Watch Co. v. Artists Alliance* (CA 9), 191 F2d 700, 705, 1951:

“On occasion motions to dismiss supply a useful technique for the prompt disposition of suits, and the Federal Rules of Civil Procedure which permit judgment on the pleadings are useful indeed. But it must be borne in mind that in many a suit such a motion cannot take the place of submission of evidence and of findings of fact and conclusions of law. Every motion to dismiss must be viewed in light of Rule 8 (a), (e), and (f), Federal Rule Civil Procedure 28 U.S.C.A. Such a motion should not be granted unless it appears clearly that no cause of action is stated.”

There is a large and growing number of cases which have permitted a recovery in similar situations:

1. *Davis v. Turner* (CA 5), 197 F2d 847, 1952. Plaintiff's complaint charged the Sheriff and the Deputy of Smith County, Texas entered her store without necessary warrants, conducted a search and found nothing unlawful. Immediately thereafter they arrested her, seized her violently by the arm and refused to permit her to consult an attorney and put her in jail. The Sheriff also refused to tell her what crime she was

charged with committing. The District Court granted the defendant's motion to dismiss but this was reversed by the Court of Appeals. Judge Holmes speaking for the Court stated that these facts gave rise to a cause of action under Section 1983 as follows:

"The motion to dismiss admitted to well-pleaded allegations of fact contained in the complaint, and we think that these allegations were sufficient to state a cause of action and to entitle the plaintiffs to a trial on the merits."

2. *Lewis v. Brautigam* (CA 5), 227 F2d 124, 1955. Plaintiff's complaint stated that defendant Deputy Sheriffs removed plaintiff from the County Jail to State Prison to prevent him from preparing his defense for a murder trial. It also stated that defendant State's Attorney ordered these deputies to force plaintiff to pose for photographs showing him in convict garb at the State Prison and to enter a plea of guilty. The Sheriff was also joined as a defendant because of the acts of his Deputies although he did no overt act himself. The State's Attorney also filed a petition stating he believed that the investigation and safety of plaintiff during the investigative period would be best served by causing him to be transferred to the State penitentiary. He allegedly requested this order without notice although in fact he knew that the petition was not well founded and was contrary to Florida Law. The Court of Appeals held the complaint stated a cause of action as follows (LC 127):

"The defendants would have us treat the complaint

as filed strictly under the statute providing against conspiracy to interfere with civil rights, 42 U.S. C.A. 1985 (footnote 1, *supra*), which has been often held to reach a conspiracy to deprive one of civil rights only when its object is a deprivation of equality, and not to cover conspiracies to deny due process. See *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253; *Whittington v. Johnston*, 5 Cir., 201 F2d 810, 811; *Mitchell v. Greenough*, 9 Cir., 100 F2d 184, 187; *McShane v. Moldovan*, 6 Cir., 172 F2d 1016, 1018; *Bottone v. Lindsley*, 10 Cir., 170 F2d 705, 706; *Dunn v. Gazzola*, *supra*; *Ortega v. Ragen*, *supra*. If so, we would have to determine whether there has been a violation of that mere minimum of equal protection secured both by the due process clause and by the equal protection clause of the Fourteenth Amendment. See *Traux v. Corrigan*, 257 U.S. 312, 332, 42 S.Ct. 124, 66 L.Ed. 254; 12 Am. Jur., Constitutional Law, 472. We do not think, however, that we are required so to treat the complaint. It charges that the conspiracy was actually carried into effect. If, thereby, the plaintiff was deprived of any rights, privileges or immunities secured by the Constitution and laws, the gist of the action may be treated as one for the deprivation of such rights under the broader civil rights statute, 42 U.S.C.A. 1983 (footnote 2, *supra*). See *Watkins v. Oaklawn Jockey Club*, 8 Cir., 183 F2d 440, 441.

“Under that statute, it is now well settled that law officers who exact confessions by violence can be held civilly liable. See *Geach v. Moynahan*, 7 Cir., 207 F2d 785. * * * Indeed, under 18 U.S.C.A. 242, which is the

criminal counterpart of 42 U.S.C.A. 1983, officers who exact confessions by violence can be held criminal liable. *Williams v. United State*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774, affirming 5 Cir., 179 F2d 656; *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495. As against the defendants Mills and Blackford, therefore, it is clear that the complaint states a claim upon which relief can be granted.

“As to the defendant Kelly, the sheriff of Dade County, it seems that under the laws of Florida the acts of his deputy, done under color of office, may be imputed to the sheriff. * * *

“As to the State’s Attorney, Brautigam, the question is more difficult. A prosecuting attorney has many duties involving the exercise of grave discretion in the performance of which he is a quasi-judicial officer representing the state. *Segars v. State*, 94 Fla. 1128, 115 So. 537; 42 Am.Jur., *Prosecuting Attorneys*, 2. Ordinarily, when so acting, he cannot be compelled to answer to a private citizen for errors in the determination either of law or of fact. 42 Am.Jur., *Prosecuting Attorneys*, 274. For full and able discussions of the exemption vel non of public officers from liability under the civil rights acts, because of the discretionary nature of their duties, see the recent cases of *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; *Morgan v. Sylvester*, 2 Cir., 220 F2d 758, affirming D.C., 125 F. Supp. 380; *Francis v. Lyman*, 1 Cir., 216 F2d 583; *Dunn v. Gazzola*, 1 Cir., 216 F2d 709, and *Cobb v. City of Malden*, 1 Cir., 202 F2d 701, 706; see also, *Gregoire v. Biddle*, 2 Cir., 177

F2d 579. We need not, however, explore that difficult and important field of law upon the present appeal, further than to say that a quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office. *Cooper v. O'Connor*, 69 App.D.C. 100, 99 F2d 135, 138, 118 A.L.R. 1440; 43 Am.Jur., Public Officers, 277."

3. *McShane v. Moldovan* (CA 6), 172 F2d 1016, 1949.

Plaintiff alleged a conspiracy on the part of the Justice of Peace, a complaining witness, Constable and others in that she was arrested in her home without a warrant on a charge of assault. She asserted that she demanded a jury trial by an impartial jury pursuant to the Michigan law and the Justice of the Peace instructed the Constable to prepare a list. However, the constable, together with complaining witness and the Justice of the Peace, fraudulently prepared a list from which all but two competent jurors were excluded. The Jurors selected were allegedly under political obligation to appellees and known to be hostile to appellant. As a result she was unlawfully imprisoned, tried without due process, suffered an illegal conviction and sentenced and was compelled to appeal to the Circuit Court where she was finally acquitted. It was held that while acts of the officers within the ambit of their personal pursuit were plainly excluded from the civil rights law "acts of officers who undertake to perform their special duties are included

where they hew to the line of their authority or overstep it.” (LC 1021.)

4. *Burt v. City of New York* (CCA 2), 156 F2d 791, 1946.

A registered architect sued the City of New York and its officials charging that he was required to make applications to officials of the building department before he could undertake his employment and these officials deliberately misinterpreted and abused their statutory power by denying his application or imposing upon him unlawful conditions while they unconditionally approved applications of other architects similarly situated. Judge Learned Hand speaking for the Court held that this stated a cause of action under the Civil Rights Law and a denial of equal protection.

5. *Dinwiddie v. Brown* (CA 5), 230 F2d 465, 1956, C.D. 76 S.Ct. 1041.

The Court held that where state officers conspired with private individuals to defeat or prejudice litigants in the State Court, the litigant was thereby denied equal protection and a cause of action was created cognizable by the Federal Courts under the provisions of the Federal Civil Rights Law. This is precisely what is charged in the case at bar.

6. *Picking v. Pennsylvania R. Co.* (CCA 3), 151 F2d 240, 1945.

Picking was arrested pursuant to a request for extradition. He alleged that defendant Justice of the Peace refused to give him a hearing required by the law and

that the defendants district attorney of New York, the Pennsylvania Railroad, the Governors of New York and Pennsylvania and various police officers of the City of New York were parties to a conspiracy to deprive him of his liberty without due process. The Court held he had stated a cause of action under the Civil Rights Law.

7. *Geach v. Moynahan* (CA 7), 207 F2d 714, 1953.

Complaint alleged that two Chicago policemen came to plaintiff's home and upon being admitted accused him of having committed a crime. After they entered his home, defendants seized personal papers without a warrant and informed him that he was under arrest and was to be taken to the police station. Upon arrival at the station they threatened, intimidated and beat him and "in general" subjected him to the "usual third-degree practices used by members of the Chicago police department to obtain information and/confessions." A judgment of dismissal was reversed by the Court of Appeals. The Court quoted from the decision of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, 1946, as follows:

"Respondents' contention did not show that petitioners' cause is insubstantial or frivolous, and the complaint does in fact raise serious questions, both of law and fact, which the District Court can decide only after it has assumed jurisdiction over the controversy." It seems undeniable that the complaint at bar is far from frivolous and is of the utmost importance to every citizen.

8. *Glicker v. Michigan Liquor Control Commission* (CA 6), 160 F.2d 96, 1947.

Appellant was the owner of a Class C license as a Michigan citizen authorized to sell liquor in Detroit. The license was revoked after notice and hearing by a member of the Commission because appellant allegedly sold liquor to minors. Appellant contended that the license was unlawfully and illegally revoked, a deliberate discrimination because of political reasons, and was done deliberately for the purpose of treating appellant in a different manner than any other owner of a Class C liquor license and in violation of her rights under the 14th Amendment. Judgment of dismissal was reversed by the Court of Appeals. The Court stated (LC 99):

“The equal protection clause of the Fourteenth Amendment is a right in itself, separate and independent from the rights protected by the privileges and immunities clause of the Fourteenth Amendment. The privileges and immunities clause is restricted to citizens of the United States; the equal protection clause extends its protection to ‘any person’ within the jurisdiction of the state. In *Truax v. Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 ALR 375” * * * The Court said — “The guarantee was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression or inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.”

* * * In *Sunday Lake Iron Company against Township of Wakefield*, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154, the Court said at page 352 of 247 U.S., at page 495 of 38 S.Ct., 62 L.Ed. 1154—The purpose of the equal

protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

"* * * In *Snowden v. Hughes*, *supra*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497, where it is stated—'The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination'."

(LC 100) "* * * While the Federal Government does not have the right to regulate matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment, to prevent such regulation from being arbitrary or discriminatory. *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 823; *Adams v. Tanner*, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336.

"* * * The fact that the appellant is in the liquor business does not release the state from the restrictions on its regulatory powers above referred to. It may authorize the state to impose more stringent regulations against those engaged in that business than are imposed against those engaged in other callings, 'but it affords no justification for discriminating between persons similarly situated who may be, or who may desire to become, engaged in that calling'."

If the Court is vigilant to prevent an individual from intentional discrimination and to unequal treatment where a liquor license is involved, is invested with equal powers to guard against unjust and unequal treatment where personal liberties are infringed.

9. *Bomar v. Keyes* (CCA 2), 162 F2d 136, 1947.

Plaintiff was a probationary teacher of home economics in a Brooklyn High School. She was discharged from that position because of a complaint lodged against her on the grounds she was absent from her teaching from March 7, 1939 to April 4, 1939 while serving upon a Federal Jury. Judgment of dismissal was reversed. Judge Learned Hand stated that cause of action was stated under the Civil Rights Law and since the plaintiff was denied a right granted by the federal statute and the court was invested with ample jurisdiction to see that federal rights of this nature were protected.

10. *State for the Use and Benefit of Temple v. Central Surety and Insurance Corp.* (D.C. Ark.), 102 F. Supp. 444, 1952.

Complaint charged that defendants acting under color of law, forced the truck in which plaintiff was riding off of the public highway, threatened plaintiffs with a drawn revolver, forcibly and falsely restrained them of their liberty for ten minutes and that the other defendants conspired with defendant to force them off the highway and deprived them of their rights as citizens. They were not charged with the violation of any specific law and in fact they were not violating the law.

It was held that since it did not clearly appear that there was no genuine fact issue involved defendant's motion for a summary judgment would be denied.

11. There are also a large number of cases which have held that law officers who extract confessions by violence can be held civilly liable under Civil Rights Law.

Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 ALR 1330, 1945.

Williams v. United States, 341 U.S. 97, 71 S. Ct. 576, 95 L. Ed. 774, 1951.

Watkins v. Oaklawn Jockey Club (CA 8), 183 F2d 440, 441, 1950.

12. *Morgan v. Null* (D.C. N.Y.), 120 F. Supp. 803, 1954.

Complaint alleged that various state officers participated in a conspiracy whereby under color of state law plaintiff was unlawfully seized and detained. This was held to state a cause of action for violation of the Civil Rights Law.

There are also a number of cases dealing with labor meetings and the like which have been held to give rise to civil damages under the act. For example, in *Condra v. Leslie & Clay Coal Company* (D.C. Ky.), 101 F. Supp. 774, 1952, the complaint alleged that defendant company, certain individuals engaged in coal mining operations, state officers and certain Kentucky counties who were also defendants, conspired among themselves and with others to deprive plaintiff of their constitutional rights of equal protection and privileged and immunities by means of threats and force while plaintiffs were

engaged in attempting to disseminate the information concerning the labor management relation acts to employees of the operators. Motion to dismiss was overruled. In accord *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, 1939.

13. *Cooper v. Hutchinson* (CA 3), 184 F2d 119, 1950. 1950.

Plaintiff alleged that out of state counsel had been admitted pro hac vice to defend him against a murder charge. The trial judge, subsequently without a hearing or any showing denied the attorney the privilege of appearing. The Court held that this was a deprivation of due process and therefore under Section 1983 it had jurisdiction to entertain a suit for injunctive relief against against the judge.

There are a large number of other cases which could be cited but in the interest of brevity they will be omitted.

In the vast majority of the cases under the Civil Rights Law, a violation of the equal protection provisions were stated. In order to give rise to violation of equal protection the cases have indicated that the following elements must be present:

1. There must be action under color of law not merely individual action;
2. There must be a purposeful and systematic and intentional discrimination;
3. The plaintiff must be subjected to an inequality of treatment;

4. The act must not be privileged or compelled by law;

5. There must be damages suffered as a result.

It will be noted that each of these elements is expressly pleaded in the second amended complaint filed in this proceeding. (Tr. 4-13.) Under the fundamental rule all allegations that are pleaded must be assumed to be true.

There are a number of decisions which have recognized that the doctrine of privilege applies to judges, and legislators in practically all situations;

Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019, 1951.

although as pointed out by 66 Harvard Law Review 1285, 1286, "Congress probably intended to do away with immunity in suits brought under the acts." (page 1296). And this is the express holding of the *Picking v. Pennsylvania R. Co.* case, 151 F2d 240, CCA 3, 1945. Most cases have, however, recognized the immunity of judges and legislators. There are also a limited number of cases which had extended the privilege to so-called quasi-judicial officers acting pursuant to the order of the Court or while exercising a discretionary function. *Thompson v. Heither* (CA 6), 235 F2d 176, 1956. But the cases are clear that their immunities apply only where they act within the scope of their authority and in obedience to the order of the Court. *Lewis v. Brautigam*, supra at 129; *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F2d 135, 138; 43 A.J. Public Officers, §277. Furthermore, it

has been noted on the occasions the "discriminatory exercise of a discretionary power vested in an administrative agency may constitute a denial of equal protection of laws." *Ex Parte Bridges* (D.C. Cal.), 49 F. Supp. 292, 299, 1943.

Lewis v. Brautigan, *supra*, at 129.

Cooper v. O'Connor, 69 App. D.C. 100, 99 F2d 135, 138.

43 Am. Jur., Public Officers, §277.

In this case it expressly stated in the complaint that the appellees did not act within the scope of their authority. Furthermore, appellees Hanson and Holden intentionally violated the order of the Court. None of the appellees were vested with any discretionary power with the possible exception of defendant Wair, the Superintendent of the State Mental Hospital and as stated in the complaint he exercised his authority in a willful, malicious, intentional and discriminating way. (Tr. 12.)

We respectfully urge the Court to permit our client to have his day in Court. Judge McCulloch felt that the case had sufficient merit to warrant setting aside a previous order dismissing the case for failure to prosecute. (Supp. Tr. 31.)

The decided tendency is to give the Civil Rights Acts the interpretation which their language demands. A recent article in 26 Indiana Law Journal, page 379 stated:

"While the Collins case in effect prevent extension of the remedy to embrace private infringements of Civil Liberties, other recent developments under Section 43 and 47 (3) indicated that, despite their antiquity, long

dormancy, vague phraseology and other defects, the Courts are beginning to accord them the scope and significance which Congress originally intended." In any event, as noted by this Court in *Gruen Watch Co. v. Artists Alliance* (CA 9), 191 F2d 700, 1951 (LC 705) "a motion cannot take the place of submission of evidence and the findings of fact and the conclusions of law." The language of Justices Stone and Cardozo in their concurring opinion in *Bordens Farm Products v. Baldwin*, 293 U.S. 194, 213, 55 S.Ct. 187, 193, 79 L.Ed. 281, 291, 1934, seems completely appropos:

"We are in accord with the view that it is inexpedient to determine grave constitutional questions on a demurrer to a complaint, or upon an equivocal motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clear.

We respectfully urge Your Honors to give Mr. Hoffman an opportunity to present evidence which will establish that he was deprived of most of the important safeguards of The Federal Constitution.

Respectfully submitted,

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ALEXANDER, BUEHNER & TILBURY
Attorneys for Appellant

No. 15782

United States
COURT OF APPEALS
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F.
KELLER and DR. F. SYDNEY HANSEN,

Appellees.

BRIEF OF APPELLEES

C. H. HALDEN and DR. F. SYDNEY HANSEN

*Appeal from the United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, Judge

FILED

MAR 25 1958

PAUL P. O'BRIEN, CLERK

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BRIEF OF APPELLEES

C. H. HALDEN and DR. F. SYDNEY HANSEN

*Appeal from the United States District Court for the
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HONORABLE WILLIAM G. EAST, Judge

STATEMENT OF THE CASE

For purposes of this brief, the statements of the case set forth in the filed briefs of appellants, Dr. Donald E. Wair and Dr. G. F. Keller, are herein adopted as correct recitations of the general history of this appeal. With regard to the appellants, Dr. F. Sidney Hansen and C. H. Halden, by whom this brief is filed, it can be added that

the former was and is the duly appointed and acting County Health Officer of Multnomah County, Oregon, and C. H. Halden was and is his duly appointed and acting Deputy Health Officer (Tr. 4).

SUMMARY OF ARGUMENT

I.

The second amended complaint of plaintiff fails to state a claim against the appellees Hansen and Halden under the Civil Rights Act.

POINT AND AUTHORITIES 1

The propositions of law as stated in the filed brief of appellee, Dr. Donald E. Wair, under Points and Authorities 1 and 2 of Summary of Argument I, are in conformity with the position of the appellees Hansen and Halden and are herein adopted and incorporated within this brief. Additional authorities in support of these propositions are here provided:

ORS 431.410;
 ORS 431.440;
 OCLA 99-201;
 Ortega v. Ragen, 216 F.(2d) 561 (CA 7, 1954);
 Smith v. Mozier, 148 F. Supp. 638 (D.C. Mich. 1957);
 Thompson v. Heither, 235 F.(2d) 177 (CA 6, 1956);
 Peckham v. Scanlon, 241 F.(2d) 761 (CA 7, 1957);
 Cuiska v. City of Mansfield, 250 F.(2d) 700 (CA 6, 1957);
 Dunn v. Gazzola, 216 F.(2d) 709 CA 1, 1954);
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Dinwiddie v. Brown, 230 F.(2d) 465 (CA 5, 1956);
 Agnew v. City of Compton, 239 F.(2d) 226 (CA
 9, 1956), Cert. den. 353 U.S. 959, 77 S. Ct. 868,
 1 L. Ed. (2d) 910.

II.

The claim alleged against the appellants, Dr. F. Sidney Hansen and C. H. Halden is barred by the applicable Oregon Statute of Limitations.

POINT AND AUTHORITIES 1

The propositions of law and authorities in support thereof as contained in the brief of Dr. Donald E. Wair under Points and Authorities 1 and 2, Summary of Argument II, are in conformity with the position of the appellees, Hansen and Halden, and are herein incorporated and adopted in this brief.

ARGUMENT

I.

The arguments in support of the foregoing propositions of law contained in the brief of the appellee, Dr. Donald E. Wair, insofar as they apply to the appellees Hansen and Halden, are herein adopted and incorporated. It is clearly apparent from the authorities contained therein, that the legislative intent of the enactors of the Civil Rights Act was never to abrogate or lessen the common law immunity from tort liability which a long line of legal decisions has established for the judiciary. Likewise it is apparent that this immunity would be a thing of

little value if it were only exercised in favor of those who possess the title of judge, and this is reflected in the wealth of cases stating this truth and applying the same protection to quasi-judicial officers as well.

This has been stated in *Miller v. Director, Middleton State Hospital*, 146 F. Supp. 674, 677 (S.D.N.Y., 1956), affirmed 243 F.(2d) 527, cert. den — U.S. —, 78 S. Ct. 124, 2 L. Ed. (2d) 78.

“For this reason, I have inquired into the possibility that the Civil Rights Act may provide a cause of action for the plaintiff. It is not necessary, however, to determine whether the allegations in the complaint are sufficient to satisfy the essential elements of an action under this Act, since even if they are, the defendant would still be immune from liability. It now appears to be well settled that the Civil Rights Act did not abolish some of the well-established common law immunities such as those for legislators, judges and persons in other quasi-judicial positions. To the extent that the director was called upon to exercise discretion in determining when the plaintiff should be discharged, he was exercising a quasi-judicial role and is therefore immune. To the extent that he was merely executing the order of the State Supreme Court justice his immunity is equally clear. *It would certainly be paradoxical to grant immunity to the judge entering the order and yet impose liability on those executing it.*” (Emphasis supplied)

The modern cases have followed this reasoning and have specifically applied it in favor of the following quasi-judicial officers in cases brought under the Civil Rights Act, where in each instance, the court determined the officer immune from civil liability:

1. Prosecuting Attorney—*Kenny v. Fox*, 232 F.(2d) 288 (6th Cir., 1956) cert. den. 352 U.S. 855, 856, 77 S. Ct. 84, 1 L. Ed (2d) 66.
2. Warden of Penitentiary—*Ortega v. Ragen*, 216 F.(2d) 561 (CA 7, 1954).
3. Judge, Prosecutor, and Deputy Sheriff—*Smith v. Mozier*, 148 F. Supp. 638 (D.C. Mich. 1957).
4. Judge, Prosecuting Attorney, Chief Assistant Prosecuting Attorney, Police Commissioner, Police Officers—*Thompson v. Heither*, 235 F.(2d) 177 (CA 6, 1956).
5. Judge, Assistant State's Attorney, Court Reporter, Warden of Penitentiary—*Peckham v. Scanlon*, 241 F.(2d) 761 (CA 7, 1957).
6. State's Attorney, First Assistant State's Attorney, and Foreman of Grand Jury—*Cawley v. Warren*, 216 F.(2d) 74 (CA 7, 1954).
7. Judge, Probation Officer, Police Chief, Police Sergeant—*Dunn v. Estes*, 117 F. Supp. 146 (D.C. Mass. 1953).
8. Judge and Four Police Officers—*Cuiska v. City of Mansfield*, 250 F.(2d) 700 (CA 6, 1957).
9. City Electrical Inspector, and Two Police Officers—*Agnew v. City of Compton*, 239 F.(2d) 226 (CA 9, 1956), cert. den. 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. (2d) 910.

For this inquiry the appellees Hansen and Halden are beyond question quasi-judicial officers, in that they are

County Health Officers. The court will take judicial cognizance of the applicable Oregon Statutes and in doing so will note the provisions of ORS 431.410 which, at the time of the acts alleged in the complaint, were contained in OCLA 99-201.

“(1) The county judge and county commissioners . . . shall constitute a board of health ex officio, for each county and city, respectively, of the state, whose duty it shall be to: * * * ”

“(2) Each local board shall select a secretary, who shall be in possession of a license issued to him by the State Board of Medical Examiners, who shall be the health officer of the appointing board and so commissioned by the State Board of Health * * *.”

ORS 431.440, formerly OCLA 99-201, provides:

“All county and city health officers shall possess the powers of constables or other peace officers in all matters pertaining to the public health.”

From the material allegations of the complaint (Tr. 4-9) it can be seen that the action of the appellees was squarely within their prescribed duties and jurisdiction, as the executive arm of the court, and while they “were acting in their official capacities and within the scope of their jurisdiction and authority, they were immune from civil liability to the plaintiff.” *Smith v. Mozier*, supra, at page 639.

Analyzing the balance of the complaint after the separation of the material portions therefrom, we find many unfounded conclusions of alleged wrongs which, if in fact true, might constitute a violation of due process as to the plaintiff; but which on analysis, can only be deemed to be breaches of duties that lie solely with the court and

not with the appellees here, e.g., the right to select a physician of his choice, the right to counsel, the right to witnesses, etc. (Tr. 3-7), *Cuiska v. City of Mansfield*, supra, and *Dunn v. Gazzola*, 216 F.(2d) 709 at 711 (CA 1, 1954), wherein it was stated,

“With regards to the actions of Gazzola and Marron previous to the trial, the notification by Gazzola and service of the complaint by Marron subjected the plaintiff to trial, but not to an ‘unfair’ trial. The control of the trial was exclusively within the province of the court * * * other allegations against the officers with regard to their failure to give proper notice of trial or to advise the plaintiff of her right to counsel are even more frivolous; the court, not the arresting officers, has the duty to give an accused whatever notice and whatever advice are required.”

To the second amended complaint, were added allegations that the acts of the appellees were done “wilfully” and “maliciously,” but these do not render it any more effective or sufficient, for as stated in *Whittington v. Johnston*, 201 F.(2d) 810, at 812 (CA 5),

“Plaintiff alleges that in instituting the lunacy inquisition, the defendants acted wilfully and maliciously. But this adds no strength to the complaint under 8 U.S.C.A. Sec. 43. Neither the Fourteenth Amendment nor the Civil Rights Act purport to secure a person against unfounded or malicious lunacy proceedings. If the facts here involved make out a case of false arrest or malicious prosecution, the redress of such wrongs is left with the states.”

A further attempt to bring the appellees within the act, is the use of the allegations as to conspiracy, but this as well does not aid the plaintiff in his task. In *Dinwiddie v. Brown*, 230 F.(2d) 465 (CA 5, 1956), at page 469, the court said,

“Merely characterizing their conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted.”

Remaining after the exclusion of the above allegations from the complaint, we can only find extensive conclusory statements that the purpose of the appellees’ act was to intimidate and coerce the plaintiff from “exercising and availing himself of due process and the due course of law” (Tr. 7) “under the Constitution of the United States and the laws of the State of Oregon” (Tr. 9). General allegations of this kind have consistently been rejected for the purpose of providing sufficiency to an otherwise insufficient complaint. *Agnew v. City of Compton*, supra.

Allegations of another nature are made in that the plaintiff complains that the appellees conspired to deprive him of equal protection of law and that they purposely and intentionally discriminated against him. Such contention, when completely unsupported by facts indicating in what fashion the plaintiff was treated differently from others in the same situation, has always been denied by the courts. *Dunn v. Gazzola*, supra, *Ortega v. Ragen*, supra.

ARGUMENT

II.

The arguments in support of the proposition of law that the claim against the appellees herein is barred by the applicable Oregon Statute of Limitations as set forth in the filed brief of the appellee, Dr. Donald E. Wair, are herein adopted and incorporated in this brief, insofar as they apply to the appellees, Hansen and Halden.

CONCLUSION

We are here presented with a situation in which, on two occasions, the plaintiff has presented to the United States District Court, for the District of Oregon, a complaint purporting to allege a claim against certain persons and public officers of the State of Oregon. In each instance, it was the considered opinion of that court, that the complaint did, in fact, fail to state a valid claim for relief. These decisions were correctly made, for as shown above as to the appellees Hansen and Halden, they are immune from liability to the plaintiff by virtue of their quasi-judicial position. Nowhere in the complaint can we find any sufficient grounds for removing this protection from them.

“Thus from what has been said, it is crystal clear that certain public officials, at least those exercising quasi-judicial functions, acting within the sphere of their duties enjoy the same absolute privilege as judges and the reason for the policy is, as Judge Hand states in *Gregoire v. Biddle*, 2 Cir., 177 F.(2d) 579, 580, 581, to permit public officials to act unflinchingly in the discharge of their duties and without a constant dread of retaliation.” *Dunn v. Estes*, supra, at 148.

It is respectfully submitted on behalf of the appellees Dr. F. Sidney Hansen and C. H. Halden, that the judgment of the court below, dismissing the appellant's action against them should be affirmed with costs.

Respectfully submitted,

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In the United States Court of Appeals for the Ninth Circuit

No. 15782

ADOLPH G. HOFFMAN,

Appellant,

v.

**C. H. HALDEN, DR. DONALD E. WAIR,
DR. G. F. KELLER and DR. F. SYDNEY HANSEN,**
Appellees.

BRIEF OF THE APPELLEE WAIR

**Appeal from the United States District Court for the
District of Oregon**

Honorable William G. East, Judge

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JURISDICTION OF COURT OF APPEALS WITH RESPECT TO APPELLEE DR. DONALD E. WAIR

This is an appeal from a judgment (Tr. 18) of the United States District Court for the District of Oregon entered October 15, 1957, dismissing, as against the appellee Dr. Donald E. Wair, appellant's second amended complaint upon the ground that said complaint failed to state a claim upon which relief could be granted.

Section 1291, Title 28 U.S.C., confers jurisdiction upon this Court to review that judgment.

JURISDICTION OF UNITED STATES DISTRICT COURT WITH RESPECT TO APPELLEE DR. DONALD E. WAIR

With respect to the appellee, Dr. Donald E. Wair, appellant's second amended complaint attempted to invoke the jurisdiction of the United States District Court for the District of Oregon by setting forth alleged deprivations of appellant's civil rights occurring in connection with a hearing had on appellant's sanity in the Circuit Court for the State of Oregon, Multnomah County, which hearing resulted in appellant's confinement in the Oregon State Hospital at Pendleton, Oregon.

The appellees are alleged to have conspired:

“ * * * to deprive plaintiff of the equal protection of the laws of Oregon, to wit, the laws in relation to due and established tribunals, their organization, procedure and course of justice, and particularly those relating to the commitment of persons alleged to be mentally ill; and further conspired to deprive plaintiff of those rights provided under the Constitution and laws of the United States and particularly

those set forth in paragraph II herein, and conspired to impede, hinder, obstruct and defeat the due course and due process of law and justice in the State of Oregon; and further conspired to deprive plaintiff of the rights, privileges and immunities secured by the Constitution and laws of the United States extended to citizens of the United States and particularly those set forth in paragraph II herein; that all of said acts and those set forth throughout this complaint were committed by defendants, and each of them, while acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and were not committed in their individual capacity.” (§ VII of Second Amended Complaint; Tr. 4-5)

The appellee Wair’s part in the aforesaid conspiracy is, by the allegations of the second amended complaint, limited to the following acts:

“1. Wilfully and intentionally forcefully restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew that defendant was being held illegally;

“2. Wilfully and intentionally forcefully restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew plaintiff was not suffering from mental illness;

“3. By suppressing the facts with regard to plaintiff’s illegal detention from the proper authorities;

“4. By refusing to permit plaintiff to correspond or communicate with appropriate authorities, except to a limited extent;

“5. In threatening, coercing and intimidating plaintiff in an effort to force him to dismiss a civil action which plaintiff had filed in the Circuit Court of Multnomah County, Oregon.” (§ X of Second Amended Complaint; Tr. 12-13)

Appellant alleges that as a result of the aforesaid acts of the appellee Wair and the acts of the other appellees the appellant was confined against his will in the Eastern Oregon State Hospital from August 5, 1952, to and including October 23, 1952. (§ XI of Second Amended Complaint; Tr. 13)

To the foregoing charges the appellee Wair contended, by amended motion to dismiss (Supp. Tr. 40), that appellant's second amended complaint (1) failed to state a claim against appellee Wair upon which relief could be granted, (2) the claim alleged in said second amended complaint was barred by the applicable Oregon statute of limitations, and (3) sections 1985 and 1986 of Title 42 U.S.C. were unconstitutional and void.

Title 28 U.S.C., § 1343, confers jurisdiction to hear civil rights actions upon the United States District Courts. However, it is the position of the appellee Wair in this appeal that the court below did not have jurisdiction over the subject matter of this action against the appellee Wair because the second amended complaint failed to state a claim against the appellee Wair under the pertinent civil rights statutes, namely sections 1983, 1985 (2), (3) and 1986, Title 42 U.S.C.

STATEMENT OF THE CASE WITH RESPECT TO THE APPELLEE DR. DONALD E. WAIR

The appellee Wair was and is the Superintendent of the Eastern Oregon State Hospital (Tr. 4). As will be

pointed out later in this brief (*infra* 12), the appellee Wair is, with respect to his duties as such superintendent, a quasi-judicial officer with whom rests the responsibility and discretion of determining when a mental patient confined to the Eastern Oregon State Hospital is fit for release.

As to such officer the two questions in this appeal are (1) whether Congress by enactment of the civil rights statutes intended to abrogate the long-established common law immunity from tort actions attaching to quasi-judicial officers in the performance of their official duties and (2) in view of the fact that the present action was not commenced against the appellee Wair until the first amended complaint was filed on December 18, 1956 (Supp. Tr. 38), whether the Oregon two-year statute of limitations governing tort actions generally and actions for false imprisonment particularly bars the present action against the appellee Wair.

APPELLEE WAIR'S ANSWER TO APPELLANT'S SPECIFICATION OF ERROR

The District Court did not err in dismissing, as against the appellee Wair, the appellant's second amended complaint.

SUMMARY OF ARGUMENT

I

The second amended complaint fails to state a claim against the appellee Wair under sections 1983, 1985 (2), (3) and 1986, Title 42 U.S.C.

Point and Authorities 1

Congress did not intend by the adoption of the civil rights statutes to abrogate the well established common law tort immunity attaching to quasi-judicial officers in the performance of their duties.

Cawley v. Warren, 216 F. (2d) 74 (7th Cir., 1954)

Dunn v. Estes, 117 F. Supp. 146 (D. Mass., 1953)

Francis v. Crafts, 203 F. (2d) 809 (1st Cir., 1953)
cert. den. 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357

Ginsburg v. Stern, 125 F. Supp. 596 (D. Pa. 1954)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956)
cert. den. 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed. (2d) 66

Miller v. Director, Middletown State Hospital,
146 F. Supp. 674 (S.D.N.Y., 1956), affirmed
243 F. (2d) 527, cert. den. — U.S. —, 78 S.Ct.
124, 2 L.Ed. (2d) 78

Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y.,
1954) affirmed 220 F. (2d) 758, cert. den.
350 U.S. 867, 76 S.Ct. 112, 110 L.Ed. 768

Ryan v. Scoggin, 245 F. (2d) 54 (10th Cir., 1957)

Tate v. Arnold, 223 F. (2d) 782 (5th Cir., 1955)

Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783,
95 L.Ed. 1019 (1951)

8 U.S.C., §§ 43 and 47 (3) [now 42 U.S.C. §§ 1983
and 1985 (3) respectively]

Prosser, *Handbook of the Law of Torts*, 2nd ed.
pp. 780-784 (1955)

Point and Authorities 2

The appellee Wair, as Superintendent of the Eastern Oregon State Hospital, is a quasi-judicial officer and immune from tort liability under the civil rights statutes for any decision made in his official capacity relative to the discharge from confinement of appellant, irrespective of his motives for such decision.

Cawley v. Warren, 216 F. (2d) 74 (7th Cir., 1954)

Dunn v. Estes, 117 F. Supp. 146 (D. Mass., 1953)

Gregoire v. Biddle, 177 F. (2d) 579 (2d Cir., 1949)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956)
cert. den. 352 U.S. 855, 856, 77 S.Ct. 84, 1
L.Ed. (2d) 66

Miller v. Director, Middletown State Hospital,
146 F. Supp. 674 (S.D.N.Y., 1956), affirmed
243 F. (2d) 527, cert. den. — U.S. — 78 S.Ct.
124, 2 L.Ed. (2d) 78

State v. Winne, 21 N.J. Sup. 180, 91 A. (2d) 65,
(1952) [reversed on other grounds, 12 N.J.
152, 96 A. (2d) 63]

Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783,
95 L.Ed. 1019 (1951)

§ 127-202, O.C.L.A., as amended in 1949

§ 127-216, O.C.L.A.

Point and Authorities 3

The appellee Wair, as Superintendent of the Eastern Oregon State Hospital, did not have the judicial authority to determine the validity of the order of the Oregon court committing appellant to the Eastern Oregon State Hospital.

Francis v. Lyman, 216 F. (2d) 583 (1st Cir., 1954)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956)
cert. den. 352 U.S. 855, 856, 77 S.Ct. 84 1
L. E. (2d) 66

Miller v. Director, Middletown State Hospital,
146 F. Supp. 674 (S.D.N.Y., 1956), affirmed
243 F. (2d) 527, cert. den. — U.S. —, 78 S.Ct.
124, 2 L.Ed. (2d) 78

42 U.S.C., § 1986

Oregon Constitution, Article III, § 1

§ 11-401, O.C.L.A.

§ 11-442, O.C.L.A.

Oregon Laws 1949, Chapter 571, section 4

II

The claim alleged against the appellee, Dr. Donald E. Wair, is barred by the applicable Oregon statute of limitations.

Point and Authorities 1

Appellant's claim against the appellee Wair is governed by the Oregon statute of limitations.

Kenney v. Killian, 133 F. Supp. 571 (D. Mich., 1955) affirmed 232 F. (2d) 288, cert. den. 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed. (2d) 66

O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914)

Wilson v. Hinman, 172 F. (2d) 914 (10th Cir., 1949), cert. den. 336 U.S. 970, 69 S.Ct. 933, 93 L.Ed. 1121; reh. den. 337 U.S. 927, 69 S.Ct. 1164, 93 L.Ed. 1734, reh. den. 338 U.S. 953, 70 S.Ct. 478, 94 L.Ed. 588

42 U.S.C., §§ 1987, 1988

Point and Authorities 2

The gist of appellant's action against the appellee Wair is for the tort of false imprisonment, which is governed by the two-year limitation statute and hence appellant's claim against the appellee Wair is barred.

Francis v. Lyman, 108 F. Supp. 884 (D. Mass., 1952)

Gordon v. Garrison, 77 F. Supp. 477 (D. Ill., 1948)

Kenney v. Killian, 133 F. Supp. 571 (D. Mich., 1955) affirmed 232 F. (2d) 288, cert. den. 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed. (2d) 66

Lane v. Ball, 83 Or. 404, 160 P. 144, 163 P. 975 (1917)

Steiner v. 20th Century-Fox Film Corp., 232 F. (2d) 190, (9th Cir., 1956)

ORS 12.010

ORS 12.110

ARGUMENT

I

(Point 1)

The principle that certain classes of defendants are immune from liability for their acts is, of course, an old one. At common law such immunity was enjoyed by legislators, judges and certain officers who, although they were not judges, did perform judicial functions, so-called quasi-judicial officers: Prosser, Handbook of the Law of Torts, 2nd Edition, pp. 780-784 (1955).

The application of the principle of immunity, however, to actions arising under the civil rights statutes is comparatively recent. The leading case on the subject is *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). In that case the plaintiff had been summoned to appear as a witness before the Un-American Activities Committee of the California Senate because of a conflict between previous testimony of the plaintiff before the committee and subsequent statements made by the plaintiff in a petition circulated by the plaintiff to the legislature not to appropriate further funds for the committee. The plaintiff refused to testify at the later hearing and was prosecuted for contempt. Plaintiff thereafter sued the members of the committee for damages under 8 U.S.C. § 43 and 47 (3) [now 42 U.S.C. § 1983

and 1985 (3), respectively] alleging the deprivation of his civil rights under those provisions.

The Supreme Court affirmed the judgment of the District Court which had dismissed the complaint. The grounds of that holding were (1) the defendants were acting within the sphere of customary legislative activity and therefore (2) enjoyed the common law immunity from tort liability attaching to legislators for their official acts which immunity (3) Congress had not intended to abrogate by the adoption of the civil rights statutes.

The court's comments about the allegations of malice and the like in such cases is significant:

*"The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or to the hazard of a judgment based upon a jury's speculation as to motives. * * *"* (Emphasis supplied) (95 L.Ed. 1027)

While the Tenney case dealt with legislative immunity from tort liability, subsequent cases arising under the civil rights statutes have applied the principle of immunity from tort liability to judges:¹ *Francis v. Crafts*, 203 F. (2d) 809 (1st Cir., 1953), cert. den. 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357; *Morgan v. Sylvester*, 125 F.

Supp. 380 (S.D.N.Y., 1954) affirmed 220 F. (2d) 758, cert. den., 350 U.S. 867, 76 S.Ct. 112, 110 L.Ed. 768; *Tate v. Arnold*, 223 F. (2d) 782 (5th Cir., 1955); *Ginsburg v. Stern*, 125 F. Supp. 596, 600-601 (D. Pa., 1954); *Kenney v. Fox*, 232 F. (2d) 288 (6th Cir., 1956) cert. den. 352 U.S. 855, 856, 77 S.Ct. 84, 1 L.Ed. (2d) 66 (Appendix 26); *Ryan v. Scoggin*, 245 F. (2d) 54 (10th Cir., 1957) and to persons who, although they are not judicial officers, do perform judicial acts—so-called quasi-judicial² officers: *Miller v. Director*, Middletown State Hospital, 146 F. Supp. 674 (S.D.N.Y., 1956), affirmed 243 F. (2d) 527, cert. den. — U.S. —, 78 S.Ct. 124, 2 L.Ed. (2d) 78 [State Hospital Director] (Appendix 27); *Dunn v. Estes*, 117 F. Supp. 146 (D. Mass., 1953) [probation officer]; *Kenney v. Fox*, supra, [prosecuting attorney]; *Cawley v. Warren*, 216 F. (2d) 74 (7th Cir., 1954) [prosecuting attorney, foreman of grand jury].

(Point 2)

With the foregoing principles in mind we turn to the appellee Wair. Appellant was confined in the Eastern Oregon State Hospital from August 5, 1952, to October 23, 1952 (§ XI, Second Amended Complaint, Tr. 13). At that time the appellee Wair was the Superintendent of that hospital (Tr. 4). As such it was his duty to “discharge such patients as, in his opinion, [were] * * * properly fit to be discharged: § 127-202, O.C.L.A.,” as

amended by section 5, Chapter, 549, Oregon Laws 1949 (Appendix 20). Or, as more fully stated in § 127-216, O.C.L.A. (Appendix 21), the appellant Wair, as Superintendent of the Eastern Oregon State Hospital could discharge a patient "who, in his judgment, [had] * * * recovered" or "who [had] * * * not recovered but whose discharge, in the judgment of the superintendent [would] * * * not be detrimental to the public welfare, or injurious to the patient," provided that in either case "the superintendent [should] * * * satisfy himself by sufficient proof that the friends or relatives of the patient are willing and financially able to receive and properly care for such patient after his discharge.

It is clear from the above statutes that with respect to the determination by the superintendent of either the length of confinement of a mental patient or the time when a patient can be safely discharged, the superintendent performs a quasi-judicial duty:

"Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, it is generally deemed 'quasi-judicial' * * *." *State v. Winne*, 21 N.J. Sup. 180, 91 A. (2d) 65, 74 (1952) [reversed on other grounds, 12 N.J. 152, 96 A. (2d) 63].

By contrast, a ministerial⁴ duty is one that requires no judgment or discretion as to the time or manner of its execution: *State v. Winne*, *supra* (Appendix 28).

In this case the gist of appellant's claim against the appellee is simply that although appellee allegedly knew appellant was illegally confined and sane, appellee persisted in holding appellant in the hospital (§ X, Second Amended Complaint; Tr. 12-13). However, it was solely within the discretion and judgment of the appellee Wair, when appellant should have been released: §§ 127-202 and 127-216, O.C.L.A., *supra*. And even if appellee maliciously exercised this discretion under the cited provisions, nevertheless the appellee is immune from civil liability to appellant under the civil rights statutes: *Tenney v. Brandhove*, *Cawley v. Warren*, *Dunn v. Estes*, *Kenney v. Fox* (Appendix 26), *Miller v. Director, Middletown State Hospital* (Appendix 27), all *supra*.

The policy basis for this rule is sound—public officers exercising discretionary powers cannot exercise those powers primarily in the public interest if the threat of civil reprisal by private litigants for their decisions hangs constantly over their heads. The law, therefore, with respect to the acts or determinations of public officers within the scope of their duties, grants tort immunity to all such officers, honest or malicious, in order to encourage an exercise of discretion uninfluenced by motives other than that which the public good demands: *Gregoire v. Biddle*, 177 F. (2d) 579, 580-581 (2nd Cir., 1949) [Appendix 24].

(Point 3)

Appellant also attempts to state a claim against the appellee Wair by alleging that the appellee Wair continued to hold appellant “despite the fact he knew that defendant was being held illegally” (§ X, Second Amended Complaint; Tr. 13). Under the separation of powers principle, however, the appellee Wair as an administrative officer clearly had no judicial authority to determine the validity of the commitment order (Section 4, Chapter 571, Oregon Laws 1949, provides for a commitment order; see Appendix 20) under which he held the appellant: Article III, section 1, Oregon Constitution (Appendix 19). That determination, if it were to be made, was, of course, the function of the Circuit Court of Umatilla County at Pendleton, Oregon, sitting in habeas corpus: §§ 11-401 and 11-442, O.C.L.A. (Appendix 22, 23). And the federal courts in civil rights cases have agreed that state officers holding persons under judicial process need not make a determination of the validity of that process: *Francis v. Lyman*, 216 F. (2d) 585, 588 (1st Cir., 1954) (Appendix 23); *Kenney v. Fox*, supra, p. 290 (Appendix 26); *Miller v. Director of Middletown State Hospital*, supra, pp. 677-678 (Appendix 27).

II**(Point 1)**

Sections 1981 through 1988, Title 42 U.S.C., under which the appellant purports to bring his action do not

contain any provision governing the period within which civil rights actions may be brought. The rule is therefore unanimous that the applicable state statute of limitations controls in determining whether a civil rights action has been commenced in time or not: *O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914); *Wilson v. Hinman*, 172 F. (2d) 914 (10th Cir., 1949), cert. den. 336 U.S. 970, 69 S.Ct. 933, 93 L.Ed. 1121; reh. den. 337 U.S. 927, 69 S.Ct. 1164, 93 L.Ed. 1734, reh. den. 338 U.S. 953, 70 S.Ct. 478, 94 L.Ed. 588; *Kenney v. Killian*, 133 F. Supp. 471 (D. Mich., 1955), affirmed sub. nom. *Kenney v. Fox*, *supra*.

(Point 2)

We turn again to the facts of this case. Appellant alleges that he was confined in the Eastern Oregon State Hospital "from on or about the 5th day of August, 1952, to and including on or about the 23rd day of October, 1952." (§ XI, Second Amended Complaint; Tr. 13).

Since the gist of appellant's action is the alleged fact that he was illegally confined in the Eastern Oregon State Hospital without due process or equal protection of the law, it is clear that his purported claim against the appellee Wair finally "accrued" at the end of that confinement on October 23, 1952: ORS 12.010 (Appendix 22); *Lane v. Ball*, 83 Or. 404, 412, 160 P. 144, 163

P. 975 (1917); *Francis v. Lyman*, 108 F. Supp. 884 (D. Mass., 1952) affirmed sub nom *Francis v. Crafts*, supra.

So far as the appellee Wair is concerned, the appellant's action sounds in tort for false imprisonment (see § X, Second Amended Complaint; Tr. 12-13). The Oregon statute of limitations governing such actions is ORS 12.110. (Appendix 22). The limitation period provided in that statute is two years, the result being that the action against the appellee Wair was required to be brought within two years after the cause of action "accrued," more particularly, by on or about October 23, 1954: ORS 12.010, supra; *Lane v. Ball*, supra; *Francis v. Lyman*, supra.

As against the appellee Wair, however, the civil action which is the subject of this appeal (Number 7351 in the United States District Court) was not commenced at least until December 18, 1956, when the amended complaint was filed (Supp. Tr. 38)⁵. The original complaint in civil action No. 7351 did not include the appellee Wair as a party (Supp. Tr. 27). The result is that the action against the appellee Wair was not brought until more than four years had elapsed after the accrual of the appellant's alleged claim against him. As against the appellee Wair, therefore, appellant's action is barred: *Kenney v. Killian*, supra; *Accord Gordon v. Garrison*, 77 F. Supp. 477, 480 (D. Ill., 1948)

Doubtless it will be argued that since the conspiracy

is alleged to have continued up to and including June 18, 1956 (Tr. 4), that the action is not barred. That allegation, however, is a mere conclusion of law in view of the fact that the alleged result of that conspiracy was the alleged illegal confinement in the hospital from August 5, 1952, to October 23, 1952 (§ XI, Amended Complaint; Tr. 13). Accord *Steiner v. 20th Century-Fox Film Corp.*, 232 F. (2d) 190, 194, (9th Cir., 1956)

It follows from the foregoing, therefore, that appellant's action against the appellee Wair is barred by the two-year Oregon statute of limitations: *Kenney v. Kilian*, *supra*.

CONCLUSION

For the reasons advanced, the appellee, Dr. Donald E. Wair, submits that the judgment of the court below dismissing the appellant's action against him should be affirmed.

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APPENDIX

Notes

Note 1

McShane v. Moldovan, 172 F. (2d) 1016 (6th Cir., 1949) [App. Tr. 25] was decided prior to *Tenney v. Brandhove*, supra. To the extent that that case can be said to be contra to the doctrine of the immunity of judicial officers, it has been overruled by *Kenney v. Fox*, supra, p. 293.

Likewise, the case of *Picking v. Pennsylvania R. Co.*, 151 F. (2d) 240 (3 Cir., 1945) [App. Br. 26] was decided prior to *Tenney v. Brandhove* and appears to be contra to the immunity principles advanced herein. The correctness of the decision in that case, however, has been questioned by a great many courts, e.g., *Francis v. Crafts*, supra, 811, 812, *Kenney v. Fox*, supra, p. 293, including the District Court of the same circuit, *Ginsburg v. Stern*, supra, pp. 600-601.

Cooper v. Hutchinson, 184 F. (2d) 119 (3rd Cir., 1950) [App. Br. 32] did not involve the immunity principle since that case was for injunctive relief, not for damages.

Note 2

At first glance, *Lewis v. Brautigan*, 227 F. (2d) 124 (5th Cir., 1955) [App. Br. 22] appears to hold that a quasi-judicial officer (the State's prosecuting attorney) is not immune from tort liability in an action under the civil rights statutes. The court, however, recognized the principle but held that under the facts of that case it was inapplicable to the prosecuting attorney, that officer having acted "outside the scope of his jurisdiction," by coercing a plea of guilty from a criminal defendant.

In that case, of course, the prosecuting attorney, in coercing a plea of guilty, was acting entirely outside the scope of his duties.

In this case, so far as the appellee Wair is concerned, his determination of appellant's release date as Superin-

tendent of the hospital was entirely within the scope of his duties.

Note 3

The Oregon Revised Statutes did not go into effect until December 31, 1953. In view of the fact that plaintiff's purported cause of action accrued in 1952, the official Oregon compilation in effect at that time is, in general, cited throughout this brief, namely: the Oregon Compiled Laws Annotated.

Note 4

A number of the cases cited by appellant where liability was imposed under the civil rights statutes involved ministerial officers: e.g., *Davis v. Turner*, 197 F. (2d) 847 (5th Cir., 1952) [Sheriff and deputy sheriff]; *Geach v. Moynahan*, 207 F. (2d) 714 (7th Cir., 1953) [police officers]; *State of Arkansas v. Central Surety & Ins. Corp.*, 102 F. Supp. 444 (D. Ark., 1952) [police officers].

Note 5

The appellee Wair was a party defendant in another action against him and others, that action being Civil No. 7352 in the United States District Court.

CONSTITUTION AND STATUTES

Oregon Constitution, Article III, Section 1

The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Oregon Laws 1949, Ch. 549, section 5

That section 127-202, O.C.L.A., as amended by section 2, chapter 43, Oregon Laws 1947, be and the same hereby is amended so as to read as follows:

Sec. 127-202. The eastern Oregon state hospital, situate in the city of Pendleton, county of Umatilla, shall be used as an asylum for such mentally diseased persons as have been or may hereafter be committed to its care and custody. So far as can practicably be done with existing facilities and facilities hereafter constructed and maintained, those patients who have developed mental enfeeblement shall be segregated from and cared for in accommodations separate and apart from the mentally diseased patients. The superintendent of said hospital shall be a well educated physician licensed by the state board of medical examiners to practice medicine and surgery, and shall appoint an assistant superintendent and all other necessary physicians and medical assistants, who shall receive such salaries as the Oregon state board of control may authorize, within the appropriation therefor and limitations prescribed by law, all of whom shall reside at or near the hospital and shall be furnished residences or house-keeping rooms, also household furniture, provisions, fuel and light, at such rates of payment therefor as the board of control from time to time may prescribe. The assistant superintendent shall be a well educated physician licensed by the state board of medical examiners to practice medicine and surgery. *The superintendent shall, from time to time, discharge such patients as, in his opinion, are properly fit to be discharged.* (Emphasis supplied)

Oregon Laws 1949, Ch. 571, section 4

The physicians appointed shall examine such person as to his mental condition and report their separate or joint findings in writing, under oath, to the court, which findings immediately shall be filed with the clerk of the

court. Should said examining physicians find, and show by their verified findings, that the person examined is mentally ill and by reason of mental illness is in need of treatment, care or custody, and should the judge, after having examined said verified findings and considered all competent evidence submitted to him, be of the opinion that such person is in need of treatment, care or custody, *he shall adjudge such person to be mentally ill and order him committed to the proper state hospital;* provided, that if the legal guardian, relative or friend of said mentally ill person request that he be allowed to care for him in a place satisfactory to the judge, and show that he, such applicant, is competent and financially able to care for such mentally ill person, and also if it appear to the court that such mentally ill person is not criminally inclined or violent, and that proper care and treatment can and will be provided him by such applicant, and that it would be to the best interest of such mentally ill person to be paroled, the judge may, in his discretion, order and direct that said mentally ill person be released and placed in the care and custody of such legal guardian, relative or friend making such application, but such order may be revoked and said mentally ill person committed to an Oregon state hospital whenever, in the opinion of the judge, it is for the best interest of such mentally ill person. Emphasis supplied)

§ 127-216 O.C.L.A.

The superintendent of any state hospital wherein are confined persons adjudged to be insane may, by filing his written certificate with the state board of control, discharge any patient, except one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal offense, at any time as follows:

- (1) A patient who, in his judgment, is recovered.
- (2) A patient who, in his opinion, is a dotard and not insane.
- (3) Any patient who is not recovered but whose

discharge, in the judgment of the superintendent, will not be detrimental to the public welfare, or injurious to the patient; provided, however, that before making such certificate, the superintendent shall satisfy himself by sufficient proof, that the friends or relatives of the patient are willing and financially able to receive and properly care for such patient after his discharge.

ORS 12.010

Actions at law shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited shall only be taken by answer, except as provided in ORS 16.260

ORS 12.110

(1) An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

(2) An action upon a statute for a forfeiture or penalty to the state or county shall be commenced within two years.

§ 11-401, O.C.L.A.

The writ of habeas corpus and subjiciendum is the writ herein designated, and every other writ of habeas corpus is abolished. Every person imprisoned or otherwise restrained of his liberty, within this state, under

any pretense whatsoever except in the cases specified in the next section, may prosecute a writ of habeas corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.

§ 11-442, O.C.L.A.

The circuit court of the judicial district wherein the party is imprisoned or restrained, and the county court and the county judge of each of the several counties of this state wherein the party is imprisoned or restrained, shall have concurrent jurisdiction of the proceedings by habeas corpus herein provided for, and the said courts and judges thereof may issue, hear, and decide all questions arising upon habeas corpus. At any time after the allowance of such writ or warrant, by the court or judge thereof, the plaintiff therein, or the person applying therefor on his behalf, may give notice to the judge issuing the same, and thereupon, if necessary to avoid delay, such judge shall by order require that the return be made and the party produced before him at such time and place, within the county or district, as may be convenient.

CASES

Francis v. Lyman, 216 F. (2d) 583, page 585, 586

“None of these defendants, former Commissioners of Correction, caused the confinement of Francis in denial of his right to due process of law. It is true they failed to order his release; but this was nonfeasance in a situation where the Commissioner had neither the legal duty nor the legal authority to act. *The proper procedure for inquiring into the lawfulness of Francis’ confinement was by application to a court for a writ of habeas corpus.* * * *

* * *

“Naturally, the refusal of these defendants to release Francis on parole resulted in the continuance of his

confinement as theretofore. But these defendants were not the legal cause of the continuous confinement of Francis pursuant to the original order of commitment. As in the case of the former Commissioners of Correction, *the failure of the members of the Parole Board to order the release of Francis on the ground that he had been committed in defiance of his constitutional rights was mere nonfeasance in a situation wherein the Parole Board had neither the legal duty nor the legal authority to act. The Parole Board had no function to go behind the commitment order issued by Judge Crafts and to inquire into the original lawfulness of the confinement. It had the function of considering applications by a prisoner for release on parole, and of granting such applications if satisfied that the prisoner was a fit subject for parole under the conditions laid down by law. * * ** (Emphasis supplied)

Gregoire v. Biddle, 177 F. (2d) 579, 580-581 (2nd Cir., 1949)

“ * * * we think that the complaint should not stand, even though under Rule 9(b) we read the allegation that the defendants arrested the plaintiff ‘maliciously and wilfully,’ as though it had specifically alleged that they had acted altogether from personal spite and had been fully aware that they had no legal warrant for arresting or deporting the plaintiff. True, so stated, that seems at first blush a startling proposition; but we think, not only that it necessarily follows from the decision of the Supreme Court in *Yaselli v. Goff*; but that, as a new question, the result is desirable. * * *

“We discussed at length the absolute privilege of judges, and held that a United States attorney ‘if not a judicial officer, is at least a quasi-judicial officer, of the government,’ and that as such the defendant ‘in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution. * * * *The immunity is absolute and is grounded on principles of public policy. The public interest re-*

quires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions.' * * *

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. *The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.* Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. *In this instance is has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.* Judged as *res nova*, we should not hesitate to follow the path laid down in the books.

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A

moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. For the foregoing reasons it was proper to dismiss the first count." (Emphasis supplied)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956) page 290

"We agree also with the reasoning of the district judge concerning the non-liability of the two doctors. As stated in his opinion, the institutional doctors should not be expected or even permitted to go behind a court order of commitment of a person to a state mental hospital where, on its face, the order appears to be valid. * * *

* * *

"In No. 12,619, the appellant, Edward James Kenney, Jr., brought an action based upon the civil rights statute, 42 U.S.C.A. § 1983, against Joseph E. Killian, prosecuting attorney of Berrien County, Michigan, for alleged false imprisonment and malicious prosecution upon allegations that the defendant official caused the plaintiff to be confined in a county jail for about forty hours, in violation of his claimed civil rights. The district court held that the action was barred by the Michigan two-year statute of limitations; that the complaint failed to state a claim upon which relief could be granted; and that the defendant was immune from civil liability to the plaintiff under the civil rights statute. District Judge Starr wrote a full-dress opinion, *Kenney v. Killian*, D.C., 133 F. Supp. 571, in which he set forth the facts, in view of which we consider it unnecessary to restate them here.

"We pretermitted decision upon whether Kenney's action is barred by the statute of limitations, but uphold the dismissal of the suit upon the basis of no cause of action. We think the district judge has supplied in his

opinion compelling reasons for his dismissal of Kenney's action against the prosecuting attorney, who was acting in his official capacity in connection with all actions of which appellant complains. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation. *Yaselli v. Goff*, 2 Cir., 12 F.2d 396, 404, 56 A.L.R. 1239; *Cawley v. Warren*, 7 Cir., 216 F. 2d 74, 76; *Laughlin v. Rosenman*, 82 U.S. App. D.C. 164, 163 F.2d 838."

* * *

"* * * The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.' 13 Wall. 354, 80 U.S. 354."

Miller v. Director, Middletown State Hospital

146 F. Supp. 674 (S.D.N.Y., 1956) page 677-678

"* * * It is not necessary, however, to determine whether the allegations in the complaint are sufficient to satisfy the essential elements of an action under that Act, since even if they are, the defendant would still be immune from liability. It now appears to be well settled that the Civil Rights Act did not abolish some of the well-established common law immunities such as those for legislators, judges and persons in other quasi-judicial

positions. *To the extent that the director was called upon to exercise discretion in determining when the plaintiff should be discharged, he was exercising a quasi-judicial role and is therefore immune. To the extent that he was merely executing the order of the State Supreme Court justice his immunity is equally clear. It would certainly be paradoxical to grant immunity to the judge entering the order and yet impose liability on those executing it.*" (Emphasis supplied)

State v. Winne, 21 N.J. Supp. 180, 91 A. (2d) 65, 74 (1952)

" * * * In contrast it is said that an official duty is 'ministerial' when it is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and designated facts. A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. *Garff v. Smith*, 31 Utah 102, 86 p. 772, 120 Am.St.Rep. 924 (Sup.Ct.Utah 1906); *People v. Bartels*, 138 Ill. 322, 27 N.E. 1091 (Sup.Ct.Ill.1891); *State v. Meier*, 143 Mo. 439, 45 S.W. 306 (Sup.Ct.Mo. 1898)."

United States
COURT OF APPEALS
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G.
F. KELLER and DR. F. SYDNEY HANSEN,

Appellees.

BRIEF OF APPELLEE
DR. G. F. KELLER

*Appeal from the United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, Judge.

CLEVELAND C. CORY,
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BRIEF OF APPELLEE
DR. G. F. KELLER

*Appeal from the United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, Judge.

STATEMENT OF THE CASE

Plaintiff appeals from a judgment (Tr. 18-20) dated October 14, 1957, which dismissed the second amended complaint upon one of the grounds urged by all the defendants in their respective motions to dismiss (Tr. 14-17), to wit: that the said pleading failed to state an enforceable claim against the defendants upon which relief could be granted.

Jurisdiction of the district court was not predicated upon diversity of citizenship. The second amended complaint alleges that plaintiff and all the defendants are Oregon citizens. Plaintiff seeks to found jurisdiction and base his damage claim of \$201,200.00 upon a number of federal statutes relating to civil rights (Tr. 3).

1. The complaint.

The original complaint which was filed by plaintiff *pro se* on January 16, 1954, named Ashby C. Dickson, a judge of the Multnomah County Circuit Court, C. H. Halden, F. H. Dammasch, M.D., G. F. Keller, M.D., John Doe, Jane Doe and Richard Roe as defendants (Supp. Tr. 27-29). Therein plaintiff sought to recover compensatory damages of \$1,200.00 and punitive damages of \$1,500,000.00 on account of defendants' alleged conspiracy on or about January 10, 1952, to cause him to be deprived of his liberty and to be confined to the state mental hospital at Pendleton, Oregon, for 79 days. It was claimed that a hearing was held before Judge Dickson at which plaintiff "was adjudged mentally ill, on the strength, in part, of affidavits, wholly or in part false" signed by Doctors Dammasch and Keller. Plaintiff also alleged that Judge Dickson refused to allow him representation by counsel, and impaired his civil rights in other ways. Defendant Halden was alleged to have "flimflammed and bamboozled" plaintiff by advising him to remain silent and let Halden speak for him (Supp. Tr. 28-29).

Since service of process was not made upon the defendants, the action was dismissed by Judge McColloch

on August 10, 1954, for failure to prosecute (Supp. Tr. p. 30). Over two years later, on October 8, 1956, plaintiff's attorney filed a motion to set aside the dismissal order, and on November 1, 1956, the court entered an order vacating the order of dismissal (Supp. Tr. 31).

2. The amended complaint.

On December 18, 1956, plaintiff's attorney filed an amended complaint which dropped Judge Dickson, Dr. Dammasch and John Doe, Jane Doe and Richard Roe from the case, but attempted to add Dr. F. Sydney Hansen, County Health Officer of Multnomah County, and Dr. Donald E. Wair, Superintendent of the Oregon State Mental Hospital at Pendleton as additional defendants (Supp. Tr. 31-38). In the amended complaint, defendant Keller was identified as "a duly licensed physician within the State of Oregon." The amended complaint raised the prayer for compensatory damages to \$26,-200.00, but reduced the demand for punitive damages to \$100,000.00. It was alleged that the state court mental hearing was held on January 10, 1952, and that plaintiff was subsequently confined to the state hospital from August 5, 1952, to October 23, 1952 (Supp. Tr. 35).

It is unnecessary to consider the amended complaint further because it was dismissed with leave to amend by Judge Mathes on the ground that it failed to state a claim upon which relief could be granted (Supp. Tr. 38-39).

3. The second amended complaint.

In substance, the second amended complaint which was filed March 4, 1957, alleges that plaintiff was unlawfully incarcerated at the state mental hospital pursuant to a commitment proceeding in which defendants participated. As a result, it is claimed that plaintiff sustained damages and loss of earnings in the sum of \$101,-200.00. Punitive damages of \$100,000.00 are also demanded. This pleading consists largely of conclusions and exhortations to the effect that defendants conspired to deprive plaintiff of equal protection of law, due process, and of other undefined rights secured by the United States Constitution or the laws of the United States. The allegations are elaborate but, in substance, charge that defendants state and county officers and defendant Keller, a private physician, in participating in a state court proceeding in which plaintiff was charged with mental illness, failed to assure that plaintiff was not deprived of his rights in the proceeding. The allegations of the second amended complaint differ from those in the first amended complaint only in their length; the substance thereof is identical.

With respect to defendant Keller, the second amended complaint merely alleges that he is a duly licensed and practicing physician (Tr. 4). Paragraph VII contains a number of conclusory allegations to the effect that up to June 18, 1956, all the defendants conspired to deprive plaintiff of the equal protection of the laws of Oregon and of his constitutional rights; that they conspired "... to impede, hinder, obstruct and defeat the due course and due process of law in the State of Oregon"; that they

conspired “. . . to deprive plaintiff of the rights, privileges and immunities secured by the Constitution and laws of the United States . . .”; and that “. . . all of said acts and those set forth throughout this complaint were committed by defendants, and each of them, while acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and were not committed in their individual capacity” (Tr. 4-5).

In paragraph VIII plaintiff purports to allege the specific acts committed by defendants Halden and Hansen alone in furtherance of the alleged conspiracy (Tr. 5-9). In paragraph IX plaintiff claims that certain specific acts were committed by defendant Keller in furtherance of the conspiracy, while “acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and in wilful, malicious, intentional and discriminating misuse of his authority and that of other agencies of the State of Oregon including the Circuit Court for Multnomah County and Morningside Hospital . . .” (Tr. 9). These eleven alleged specific acts may be paraphrased as follows:

- (1) Making a superficial medical and psychological examination of plaintiff in contravention of the court’s order to make an adequate examination;
- (2) Certifying under oath to the court that plaintiff was incompetent despite the fact that a complete examination would have revealed the contrary;
- (3) Signing a certificate containing information concerning plaintiff although he knew this information was extremely limited and unverified;
- (4) Verifying a statement concerning plaintiff which contained numerous inaccuracies;

- (5) Refusing plaintiff's request at the time of hearing for an adequate mental examination;
- (6) Suppressing facts regarding plaintiff's illegal detention and participating in a hearing without objecting, although it was within his power to object, that plaintiff was being deprived of his constitutional rights;
- (7) Failing to object at the hearing to the following procedure:
 - (a) That plaintiff was given no opportunity to cross-examine witnesses;
 - (b) That plaintiff was excluded from hearing the testimony of witnesses;
 - (c) That plaintiff was given no opportunity to summon counsel or representative in his behalf;
 - (d) That plaintiff was given no opportunity to testify in his own behalf except for a few preliminary statements;
 - (e) That the District Attorney of Multnomah County was not present;
- (8) Wilfully participating at the hearing without objecting that the statute under which the hearing was convened was unconstitutional;
- (9) Refusing to examine plaintiff while he was held at Morningside Hospital on August 5, 1952;
- (10) Refusing to release plaintiff immediately while he was held at Morningside Hospital since he knew that plaintiff had been confined under void proceedings;
- (11) Refusing to direct defendants Halden and Hansen to deliver plaintiff to the Circuit Court, Multnomah County, rather than to Morningside Hospital on August 5, 1952, after he, personally or through his agents, knew that Halden and Hansen had disobeyed the court's order directing that plaintiff be delivered to the court rather than to Morningside Hospital.

SUMMARY OF ARGUMENT

1. In passing upon the correctness of the judgment appealed from, the court should consider only the things which defendant Keller is alleged to have done, or omitted to do, as distinguished from the conclusory allegations and factually unsupported characterizations of the complained of acts.

2. This is a case which justified and indeed compelled the district court to grant the motion to dismiss as against Dr. Keller, because the second amended complaint failed to state an enforceable claim under any of the statutory and constitutional provisions upon which plaintiff relied.

3. The Fourteenth Amendment and the Civil Rights Act are not applicable to individuals who do not act pursuant to or under color of state law.

4. The second amended complaint fails to state any facts showing that the acts complained of were done by defendant Keller under color of state law.

5. Plaintiff's counsel had two opportunities to allege facts giving rise to an enforceable claim against Dr. Keller under the Civil Rights Acts. The district court's dismissal of the second amended complaint without leave to amend was made in the exercise of its sound judgment and discretion.

ARGUMENT

I

General conclusory allegations of alleged acts as malicious, conspiratorial and done for the purpose of depriving a person of his constitutional rights, when unsupported by the complaint read as a whole, are an insufficient basis upon which to found an enforceable claim under the Civil Rights statutes.

As shown above, the second amended complaint is replete with allegations that all the defendants while acting under the color of state law entered into a conspiracy to deprive plaintiff of his constitutional rights, that they conspired to hinder, obstruct and defeat the due course and due process of justice, and that they intentionally and maliciously discriminated against plaintiff and subjected him to inequality of treatment and denied to him the equal protection of the laws. However, in passing upon the correctness of the judgment appealed from, such conclusory allegations will be rejected when unsupported by the pleading, read as a whole (*Agnew v. City of Compton*, 239 F.(2d) 226, 231 [and cases cited at note 11] (CA9), cert. den. 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. (2d) 910). As stated by Judge Hutcheson in *McGuire v. Todd*, 198 F.(2d) 60, 63 (CA5), cert. den. 344 U.S. 835, 73 S. Ct. 44, 97 L. Ed. 650:

“It is sufficient for us in this case to say: that, as other courts have done, we disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights; that the things defendants are alleged to have done, as distinguished from

the conclusions of the pleaders with respect to them, do not constitute a deprivation of the civil rights of plaintiffs, do not give rise to the cause of action claimed; and that the judgment dismissing the complaint should be affirmed.”

While a motion to dismiss for failure of the complaint to state an enforceable claim admits all facts well pleaded, such a motion “ . . . does not admit unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them” (*Ryan v. Scoggin*, 245 F.(2d) 54, 57 (CA10)).

The general views of this court on the granting of a motion to dismiss for failure to state an enforceable claim were reaffirmed in *Rennie & Laughlin, Inc. v. Chrysler Corporation*, 242 F.(2d) 208 (CA9), where Judge Barnes stated in part (p. 213):

“This is not to say or imply that a motion to dismiss should never be granted. It is obvious that there are cases which justify and indeed compel the granting of such motion. The line between the totally unmeritorious claims and the others cannot be drawn by scientific instruments but must be carved out case by case by the sound judgment of trial judges. That judgment should be exercised cautiously on such a motion.”

The decisions of the United States Supreme Court in *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 283, 95 L. Ed. 1019, and *Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 253, and the denial by that court of petitions for writs of certiorari in numerous cases where judgments of dismissal in so-called “civil rights” cases have been upheld by this and other courts of appeal, indicate that motions to dismiss supply a useful technique

in disposing of this type of damage action (see *Agnew v. City of Compton* (supra), and cases cited therein).

In considering whether the second amended complaint states an enforceable claim for relief, the governing rule is stated in *Agnew v. City of Compton* (supra, at p. 229):

“This brings us at once to the question of whether the complaint states a cause of action. It does so only if, under the *facts* alleged, there has been a deprivation of some right accorded appellant under one or more of the statutory and constitutional provisions on which he relies . . .” (emphasis supplied)

II

The second amended complaint fails to state an enforceable claim for relief against defendant Keller under any of the statutory and constitutional provisions upon which plaintiff relies.

Paragraph II of the second amended complaint states (Tr. 3):

“That this action arises under the United States Constitution and particularly Article I, Section 8, Article IV, Section 4, Amendments XIII and XIV, and Laws of the United States, Title 18 U.S.C. 231, 241, 242; Title 28 U.S.C. Section 1331 and 1343; Title 42 U.S.C. 1981-1988; Title 52 U.S.C. Section 203.”

1. Article 1, Section 8, Constitution of the United States.

Article 1, Section 8, deals generally with the powers of Congress. Apparently, plaintiff relies on the “necessary and proper clause” contained in clause 18 thereof. While it is undisputed that Congress may use appropriate means to enforce rights secured by the Constitution

or the laws of the United States, the question here is not whether Congress has such a power, but what Congress has done in exercise of the power. Plaintiff can base no claim for relief under this constitutional provision.

2. Article 4, Section 4, Constitution of the United States.

This provision provides that the United States "shall guarantee to every State in this Union a Republican Form of Government." This clause has been held to embrace political questions, rather than judicial matters (*Pacific States Telephone Company*, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377), and it deals with the relationship between the Federal Government and the states, and not individuals (*United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 558). It has no relevance to this case.

3. Amendment 13, Constitution of the United States.

This amendment prohibits slavery and involuntary servitude, except as punishment for a criminal conviction. Since it is not self-executing but contemplates legislative implementation, reference must be made to statutory law and not to the constitutional provision itself. However, the legislation enacted pursuant thereto clearly has no relevance here (see *Pollock v. Williams*, 322 U.S. 4, 64 S. Ct. 792, 88 L. Ed. 1095).

4. Amendment 14, Constitution of the United States.

The prohibition on state action contained in the second sentence of Section 1 of this amendment also is not self-executing but contemplates legislative implementation. Section 5 thereof gives Congress the power to enforce its provisions by appropriate legislation. The civil

enforcement statutes are the so-called Civil Rights Acts (42 U.S.C.A. §§ 1981-1988). Therefore, whether defendant Keller can be held liable to plaintiff for the alleged deprivation of his civil rights under the Fourteenth Amendment will be considered in the later discussion of the applicability of the Civil Rights Acts to defendant Keller.

5. Title 18 U.S.C. Sections 231, 241, 242.

There is no such section in the United States Code as 18 U.S.C. § 231. Sections 241 and 242 are criminal statutes, and “ . . . provide no basis for this civil suit” (*Agnew v. City of Compton* (supra), at 239 F.(2d) 230; *Copley v. Sweet*, 133 F. Supp. 502 (W.D. Mich.), aff’d 234 F.(2d) 660, cert. den. 352 U.S. 887, 77 S. Ct. 132, 1 L. Ed. 91; *Mattheis v. Hoyt*, 136 F. Supp. 119 (W.D. Mich.); and see *Patten v. Dennis*, 134 F.(2d) 137 (CA9)).

6. Title 28 U.S.C. Sections 1331 and 1343.

These provisions confer jurisdiction on the court. They do not purport to define substantive rights and cannot be taken as a source of any enforceable claim for relief against defendant Keller (see *Agnew v. City of Compton* (supra), at 239 F.(2d) 229).

7. Title 52 U.S.C. Section 203.

There is no such section in the United States Code. Apparently, plaintiff meant to refer to 50 U.S.C.A. § 203. This section was repealed on August 10, 1956, and is now covered by Title 10 U.S.C.A. Section 333. This lat-

ter provision merely confers on the President a power to intervene in the affairs of the states when it appears that the states are unable to protect the civil rights of individuals. The statute does not impose any duties, either civil or criminal, upon the states or upon individuals. Accordingly, it has no relevance to this case.

8. Title 42 U.S.C. Sections 1981-1988.

These statutes upon which plaintiff founds his claim for relief against defendant Keller comprise the Civil Rights Acts. However, plaintiff cannot establish a right thereunder against defendant Keller, who is merely alleged to be "a duly licensed and practicing physician within the State of Oregon" (Tr. 4), or, as stated in plaintiff's brief, "Dr. Keller, a physician who makes examination in mental cases for the state" (App. br. p. 2).

There is a general conclusory allegation in the second amended complaint that all of the acts alleged in the complaint were committed by each of the defendants "while acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and were not committed in their individual capacity" (Tr. 5), but there are no facts whatsoever to show that defendant Keller was at any time acting under color of state law.

In substance, the facts pleaded show that Dr. Keller was appointed by the circuit judge of Multnomah County to make a medical and psychological examination as preliminary to a hearing conducted before the court on January 10, 1952, concerning plaintiff's mental competency.

It is then alleged that Dr. Keller committed the following acts or omissions (Tr. 10-11):

- (a) Made a superficial examination of plaintiff;
 - (b) Certified that plaintiff was incompetent although he did not have sufficient data on which to base an intelligent judgment;
 - (c) Signed a certificate containing information gathered concerning plaintiff although the information was incomplete and unverified;
 - (d) Verified a statement concerning plaintiff which contained numerous inaccuracies;
 - (e) Refused plaintiff's request at the time of the hearing for an adequate mental examination;
 - (f) Participated in the hearing without objecting that plaintiff was being deprived of his constitutional rights;
 - (g) Failed to object when plaintiff was denied a full legal hearing and was not given an opportunity to summon counsel;
 - (h) Participated in the hearing without objecting despite the fact that he had the power to object to a hearing convened under an unconstitutional statute.
- It is further alleged: (i) Dr. Keller refused to examine plaintiff at Morningside Hospital on August 5, 1952, although it was his duty to do so; (j) he refused to release plaintiff from Morningside Hospital although he knew that plaintiff was confined under proceedings wholly void; and (k) he refused to direct defendants Hansen and Halden to deliver the plaintiff to court rath-

er than to Morningside Hospital, after he or his agents knew that Halden and Hansen had disobeyed the court's order directing that plaintiff be delivered to court rather than to Morningside Hospital.

The court will take judicial notice of the relevant Oregon statutes. The proceedings about which plaintiff complains were had under the provisions of Chapter 571 of the Oregon Laws of 1949 relating to the apprehension, examination and commitment of mentally ill persons. Sections 3 and 4 thereof (now codified in ORS 426.110-426.130), provided:

"Section 3. The judge shall appoint at least two competent physicians licensed by the state board of medical examiners for the state of Oregon to practice medicine and surgery one of whom may be the county health officer, to examine said person as to his mental condition; provided, however, that in counties having a population of 10,000 or less, as determined by the latest federal census, the judge may appoint only one such physician, who may be the county health officer, but the judge may, in his discretion, appoint additional physicians qualified as herein required, to assist in the examination of said person as to his mental condition. If the allegedly mentally ill person requests in writing that one additional examining physician be appointed, or, if in the absence of such request by the allegedly mentally ill person, such request is made by the legal guardian, relative or friend of such alleged mentally ill person, the court shall appoint a physician nominated in such request. Provided, however, that the court shall not appoint more than one such additional examining physician. Such physician shall be a resident of the state of Oregon.

"Section 4. The physicians appointed shall examine such person as to his mental condition and

report their separate or joint findings in writing, under oath, to the court, which findings immediately shall be filed with the clerk of the court. Should said examining physicians find, and show by their verified findings that the person examined is mentally ill and by reason of mental illness is in need of treatment, care or custody, and should the judge, after having examined said verified findings and considered all competent evidence submitted to him, be of the opinion that such person is in need of treatment, care or custody, he shall adjudge such person to be mentally ill and order him committed to the proper state hospital; provided, that if the legal guardian, relative or friend of said mentally ill person request that he be allowed to care for him in a place satisfactory to the judge, and show that he, such applicant, is competent and financially able to care for such mentally ill person, and also if it appear to the court that such mentally ill person is not criminally inclined or violent, and that proper care and treatment can and will be provided him by such applicant, and that it would be to the best interest of such mentally ill person to be paroled, the judge may, in his discretion, order and direct that said mentally ill person be released and placed in the care and custody of such legal guardian, relative or friend making such application, but such order may be revoked and said mentally ill person committed to an Oregon state hospital whenever, in the opinion of the judge, it is for the best interest of such mentally ill person."

Under these statutes Dr. Keller's sole function was to examine plaintiff and report his findings in writing to the court. He had no powers of commitment under Oregon law; his only role was that of an expert witness. The statute plainly shows that it was incumbent upon the court, before adjudging plaintiff to be mentally ill, to consider all the competent evidence submitted, including

the doctors' findings. Obviously, the court could accept or reject Dr. Keller's report and decide the question of mental competency on other evidence, or upon the court's observations or examination of the alleged incompetent.

Therefore, the assertion that Dr. Keller made a negligent mental examination on insufficient data does not show that plaintiff thereby was deprived of any civil right by any acts done "under color of state law."

Reference to the Oregon statutes (Sections 1-4 of Chapter 571, Oregon Laws of 1949, now codified in ORS 426.070-426.130) demonstrates that Dr. Keller was under no duty whatsoever to object to the way the commitment proceeding was conducted by the court. It was solely the court's function to grant or refuse plaintiff's request for a physical examination, to safeguard plaintiff's constitutional rights, and to dismiss the proceeding if it found that the underlying statute was unconstitutional.

Furthermore, the claims against Dr. Keller arising out of an alleged refusal to examine plaintiff on August 5, 1952, his refusal to release plaintiff from Morningside Hospital, and his refusal to order defendants Hansen and Halden to deliver plaintiff to the court rather than to Morningside Hospital, are equally insufficient to show that Dr. Keller deprived plaintiff of any of his civil rights of any acts "under color of state law." It is not alleged that Dr. Keller had anything whatsoever to do in August, 1952, with the holding of plaintiff at Morningside Hospital; it is not claimed that Dr. Keller had

been ordered by the court either to restrain or release plaintiff at Morningside Hospital, or that Dr. Keller was empowered under state law to control the actions of defendants Halden and Hansen.

Thus, even if any deprivation of plaintiff's civil rights could be spelled out, plaintiff cannot state an enforceable claim against Dr. Keller. It is axiomatic that the Fourteenth Amendment and the Civil Rights Acts do not afford protection against activities of individuals not acting pursuant to or under color or authority of state law (*Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 253; *Davidow v. Lachman Bros. Investment Co.*, 76 F.(2d) 186 (CA9), followed in *Schatte v. International Alliance, etc.*, 182 F.(2d) 158 (CA9), rehearing den. 183 F.(2d) 685, cert. den. 340 U.S. 827, 71 S. Ct. 64, 95 L. Ed. 608, rehearing den. 340 U.S. 885, 71 S. Ct. 194, 95 L. Ed. 643).

This proposition of law is not disputed by plaintiff (App. br. pp. 12, 34). Therefore, while plaintiff's brief hardly mentions Dr. Keller, plaintiff's counsel may argue that the alleged order of the circuit judge of Multnomah County appointing Dr. Keller to make an examination of plaintiff clothed Dr. Keller with sufficient authority and power under state law to give rise to his liability to plaintiff under the Civil Rights laws.

However, as above shown, Dr. Keller had no powers of commitment or supervision over plaintiff under the state statutes. His sole function was to make a written report to the court as to plaintiff's mental competency, which the court could accept or reject as it saw fit. Dr. Keller's role was that of an expert witness.

Under these circumstances, the governing rule is stated by Judge Orr in *Schatte v. International Alliance, etc.* (supra), at 182 F.(2d) 167:

“Making representations to a state official, even in a report required by law, is not acting ‘under color of law’ because it does not purport to be done on behalf of the state . . .”

A necessary corollary is that a person who files an affidavit or testifies under oath in a state court proceeding acts only as a private citizen and not under color of state law (*Smith v. Jennings*, 148 F. Supp. 641, 645 (W.D. Mich.) [collecting cases]; *Campo v. Niemeyer*, 182 F.(2d) 115 (CA7)).

On this point, three recent appellate court decisions are particularly pertinent.

In *Kenney v. Hatfield*, 132 F. Supp. 814 (W.D. Mich.), aff'd *sub nom Kenney v. Fox*, 232 F.(2d) 288 (CA6), cert. den. 352 U.S. 855, 77 S. Ct. 84, 1 L. Ed. (2d) 66, plaintiff had been adjudged mentally ill and was ordered committed by a state court. The commitment petition was made by a deputy sheriff on the recommendation of defendant Robinson, a practicing lawyer. Subsequently, the commitment proceedings were determined to be void. Kenney then sued the judge, Mr. Robinson and two doctors on the staff of the state mental hospital under the Civil Rights Act. The district court granted the motions of defendants to dismiss for failure to state a claim. With respect to Mr. Robinson, the court held (132 F. Supp. at p. 817):

“As to the defendant, Thomas N. Robinson, the allegations of plaintiff's complaint are to the effect

that said defendant, then an attorney in private practice, advised Deputy Sheriff Pugh in connection with the preparation of the petition which was filed as the first step in the proceedings which resulted in plaintiff's commitment to the Kalamazoo State Hospital. There is no allegation that the defendant Robinson was acting in any official capacity or that any of his acts, proper or improper, could be classed as the acts of the State of Michigan, except as the petition was made allegedly pursuant to the provisions of the statutes of the State of Michigan. No case has been discovered wherein the Civil Rights Statute, on which plaintiff bases his action, has been held to give one in the position of the plaintiff an action against a private individual not acting 'under color of law' for wrongs done, even though the acts of such individual may have ultimately resulted in a deprivation of constitutional rights, privileges or immunities. Rather such statute appears to have been limited in application to persons who have used or misused the powers granted to them by virtue of political offices, held by them, for the purpose of *wilfully* depriving a person of constitutional rights, privileges or immunities [citations]."

The *Kenney* case was reaffirmed very recently by the Court of Appeals for the Sixth Circuit in *Cuiksa v. City of Mansfield*, 250 F.(2d) 700. In one case, plaintiff Smith had been fined for a minor traffic violation. The judgment was subsequently set aside because it was discovered that the village had no ordinance making the conduct complained of an offense. Basing his damage claim for \$200,000 upon the Civil Rights Acts, plaintiff sued the village, the judge and the constable who executed the affidavit which initiated the prosecution. In following this court's decision in *Agnew v. City of Compton* (supra), the appellate court affirmed a summary judgment in favor of defendants. With respect to

the claim against the constable, the court held (250 F. (2d) at p. 704):

“In case No. 13,228, a constable of the village of Butler was also made a defendant. The constable filed an affidavit against the appellant Smith charging him with passing on the right, which initiated the prosecution. Appellant was not placed in custody by the constable or physically restrained. At the trial the constable testified as a witness. We held in *Kenney v. Fox*, supra, 232 F.2d 288, 290, that neither an attorney who prepared the papers initiating the prosecution, nor the prosecuting attorney who prosecuted the case, was liable for damages under the Civil Rights Act. The actions of the constable in initiating the prosecution and in testifying did not deprive the appellant of any constitutional right. Nor is he responsible for the subsequent actions and rulings of the judge. *Whittington v. Johnston*, 5 Cir., 201 F.2d 810, 811-812, certiorari denied 346 U.S. 867, 74 S. Ct. 103, 98 L. Ed. 377, cited by us with approval in *Kenney v. Fox*, supra, and *Bartlett v. Weimer*, 6 Cir., 244 F.2d 955. Appellant Smith had no cause of action under the Civil Rights Act against the constable.”

Both of these decisions of the Sixth Circuit, as well as this court's opinion in *Dineen v. Williams*, 219 F. (2d) 428, 430 (CA9), cite with approval the case of *Whittington v. Johnston*, 201 F.(2d) 810 (CA5), cert. den. 346 U.S. 867, 74 S. Ct. 103, 98 L. Ed. 377. In that case the complaint alleged that the defendants, all private citizens, conspired and caused plaintiff to be declared insane by an Alabama state court and to be confined in a county jail. It was claimed that defendant Dr. Johnston, acting at the request of the four other defendants, signed a false medical certificate that plaintiff was insane and thus invoked the statutory procedure which

contained no mandatory provision for a hearing prior to commitment. In affirming dismissal of the complaint upon defendants' motions, the court held that the Civil Rights Acts do not require those who regularly institute a lunacy proceeding under a state statute to stand sponsor for the validity of the statute, or the acts of state officers administering it, and that if there was any denial of due process, the responsibility was upon the state court judge, and not upon defendants.

So, in the instant case, the duty to accord plaintiff due process of law at every stage of the proceedings rested upon the circuit judge, not upon defendant Keller. No act is alleged upon the part of defendant Keller which proximately resulted in any alleged deprivation by plaintiff of his constitutional rights.

We will not burden the court with a further discussion of the authorities. Plaintiff's counsel has cited a dozen or more cases (Plf's br. pp. 21-32) in which complaints presenting completely different factual allegations have been deemed sufficient to state causes of action under the Civil Rights Acts. How any of these cases assist plaintiff in sustaining the pleading at bar is not apparent. Moreover, it may be noted that several of the cited cases, such as *McShane v. Moldovan*, 172 F.(2d) 1016 (CA6), *Burt v. City of New York*, 156 F.(2d) 791 (CA2), *Picking v. Pennsylvania R. Co.*, 151 F.(2d) 240 (CA3), *Glicker v. Michigan Liquor Control Commission*, 160 F.(2d) 96 (CA6), and *Bomar v. Keyes*, 162 F.(2d) 136 (CA2), were decided prior to the decisions of the United States Supreme Court in *Tenney v. Brandhove*, 341 U.S.

367, 71 S. Ct. 783, 95 L. Ed. 1019, and *Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 253, and may not be good law today (see *Kenney v. Fox*, 232 F.(2d) at pp. 292-293, and *Cuiksa v. City of Mansfield*, 250 F.(2d) at p. 703).

CONCLUSION

Plaintiff's counsel also asks for a reversal on the ground that Chief Judge McColloch "felt that the case had sufficient merit to warrant setting aside a previous order dismissing the case for failure to prosecute (Supp. Tr. 31)" (App. br. p. 34). On this point, the record shows only that on an *ex parte* application of plaintiff's counsel the court vacated its previous order of dismissal for failure to prosecute. At that point in the proceedings the only pleading before the court was the original complaint prepared and filed by plaintiff *pro se*.

Upon the "evidence of the plaintiff and representations of counsel" as to the reasons for failure to prosecute the action, Judge McColloch did no more than afford plaintiff an opportunity to have an attorney plead his case. Since that time plaintiff's counsel has had "... two opportunities to make allegations of any 'facts' which would differentiate this from a cause cognizable in a federal court only by diversity of citizenship, which would necessarily appear in the pleadings" (*Dineen v. Williams*, 219 F.(2d) 428, 429 (CA 9)). The second amended complaint fails to allege facts showing that defendant Keller has deprived plaintiff of any constitutional or civil rights under the statutes pleaded therein.

The judgment below, insofar as it dismisses this action as against defendant Keller, should be affirmed, with costs.

Respectfully submitted,

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UNITED STATES
COURT OF APPEALS
For The Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR.
G. F. KELLER and DR. F. SYDNEY HANSEN,
Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the
District of Oregon

HONORABLE WILLIAM G. EAST, Judge

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APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the
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HONORABLE WILLIAM G. EAST, Judge

I.

CAUSE OF ACTION

Appellant alleges deprivation of equal protection, due process, and privileges and immunities by individuals acting under color of state law, purposeful discrimination and victimization, intentional violation

of orders of Court and law, coercion and intimidation to prevent him from exercising constitutional rights, forcing him to remain silent and not to testify, filing fake affidavits, imprisonment without due process, refusal to inform him of charges and/or to summon his attorney or witnesses, refusal to release him until he dismissed a wholly unrelated civil action, and discrimination in other particulars. Assuming these facts, as it must on motion to dismiss has plaintiff stated a cause of action under any conceivable state of facts?

This Court in *Agnew v. City of Compton* (CA 9), 239 F.2d 226, 231, 1957 stated:

“In what is said above, we do not mean to hold that a cause of action may never be stated where false arrest and imprisonment are involved. As before indicated, such a cause of action for the purpose of discriminating between persons or classes of persons. *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497. See also *Moffatt v. Commerce Trust Co.*, 8 Cir. 187 F. 2d 242, cert. den. There is here no such allegation.

“Such a complaint has also been held sufficient where it was alleged that the trial was fraudulently conducted. *McShane v. Moldovan*, 6 Cir. 172 F.2d, 1016. A like result has been reached where there were allegations as to unnecessary violence, refusal to inform of the charge, and personal indignities. *Davis v. Turner*, 5 Cir. 197 F.2d 847.”

None of appellees question the complaint sets forth all elements required except Keller, who contends we

did not allege he was acting "under color of law."

It is charged he acted "under color and pretence of the statutes, ordinances, customs and laws of the State of Oregon," he misused his "authority and that of other agencies in the State of Oregon including the Circuit Court and Morningside Hospital," he was appointed by "Circuit Judge to make an adequate medical and psychological examination of plaintiff," he refused "to make an examination of plaintiff while he was held at Morningside Hospital" and refused to "release plaintiff while he was held at said Morningside Hospital." (TR 9-12). These allegations leave no doubt he was acting under color of law having been specifically appointed, and it was his duty to make examinations before and during trial; he was in charge of state patients at Morningside Hospital where plaintiff was forcibly taken months later and it was his official duty to act in good faith.

The Supreme Court stated:

"Misuse of power, possessed by virtue of State Law and made possible only because the wrongdoer is clothed with the authority of State law is action taken 'under color of' state law." *U. S. v. Classic*, 313 U. S. 299, 326, 61 S.Ct. 1031, 1043, 15 L.Ed. 1368.

Keller could do the acts only because he was appointed by the State.

With this exception, however, other appellees apparently concede all essential elements are stated. They object that the complaint allegedly contains "unfounded conclusions" "completely unsupported by facts indicating in what fashion the plaintiff was treated differently from others in the same situation."

The complaint establishes inequality. In keeping with notice pleading, appellant did not set forth all facts. In all probability if he had, appellees would have objected it was not a "short and plain statement of the claim" as required.

After setting forth the official capacities in which appellees acted and a conspiracy to maliciously and intentionally deny equal protection, due process and privileges and immunities it charged:

1. Hansen and Halden ignored the Court direction he be brought before the Judge but instead locked him up; filed false return of citation; refused to permit him to communicate with witnesses, doctor, or counsel; refused to summon District Attorney as specifically required; took all his money and directed him to be silent at the hearing in Circuit Court; refused to inform him of the charges, imprisoned him with persons charged with crime in violation of Oregon laws. Can there be any doubt that plaintiff was treated "dif-

ferently from others in the same situation”?

2. Keller was well aware of these facts but suppressed them; made virtually no examination despite a specific direction by the Court; filed a false affidavit; several months later when appellant was forcibly brought to Morningside Hospital where Dr. Keller was in charge, in direct violation of the Court, Keller refused to obey the order, locked him up, took his money and would not permit him to communicate with anyone.

3. Wair knew these facts; that he was not mentally ill; but refused to release him although he had authority to do so at any time; instead he kept him in the hospital until appellant dismissed a wholly unrelated civil action. (TR 12-13).

The complaint is *not* predicated upon either:

1. A mistake in judgment in making a judicial decision; or
2. For carrying out an order of the Court.

We agree there would be no liability. It would be wrong to hold a ministerial officer who merely carries out an order of Court; or to hold an officer liable for mistaken judgment where exercising a quasi-judicial function. This complaint does not rest on that basis. But

it cannot be seriously contended that they merely made a mistake in judgment when they ignored instructions of Court, filed false affidavits, coerced and intimidated him, directed him to remain silent, refused to carry out the statutory mandate requiring them to summon the District Attorney, and other respects.

This distinction is illustrated by appellees' primary case, *Dunn v. Gazzola* (CA 1) 216 F.2d 709, 711, 1954. One defendant, a police sergeant, merely notified plaintiff to appear in Court and took her to prison following her conviction. He did nothing outside his jurisdiction and acted as directed by the Court. Defendant Marron, Chief of Police, merely served her with a complaint charging child neglect, and took her before the Judge. He acted strictly pursuant to the order of Court, statutes, and within his authority. Defendant probation officer merely carried out an order of Court. Fifth defendant was Superintendent of Reformatory and sixth, Commissioner of Correction. They did nothing other than fail to release plaintiff. They acted as directed and merely concluded in apparent good faith appellant was not sufficiently well. The other defendant, Probate Judge, was immune.

In this case appellees did not act as ordered but defied the Court; did not act within their jurisdiction; did not exercise a discretionary power, but discharged

ministerial duties in a vindictive and personal way. The Probate Judge is not a party.

The Court noted in the Dunn case (711) : "no facts alleged in the complaint would furnish any foundation for a claim that the defendants, or any of them, had as their purpose to deprive the plaintiff of the equal protection and immunities of the laws. * * * plaintiff alleged unfair treatment but not that it was motivated by any discriminatory design."

Here, such facts are pleaded. When a motion to dismiss is filed facts well pleaded must be assumed true. Other facts could also be developed.

This is apparent in appellees' secondary case, *Kenney v. Fox*, (CA 6) 232, F.2d 288, 1956. This action was filed against Probate Judge, Superintendent of State Hospital, physicians at State Hospital and an attorney who recommended commitment. The Court held the law cannot abrogate judicial immunity of a Judge. The two doctors could not be held because they acted strictly as directed. The mere fact they might be honestly mistaken as to plaintiff's mental condition would not impose liability. The attorney did nothing other than prepare the initial papers. All defendants acted as directed, none exceeded jurisdiction, and there was no evidence of purposeful discrimination. There

was also no violation of laws of his state. The distinction is manifest.

That the 6th Circuit was not expressing a rule of absolute immunity will be seen by *McShane v. Moldovan* (CA 6), 172 F.2d, 1016, 1949. A conspiracy by the J. P., complaining witness, constable and others to arrest plaintiff without a warrant on charge of assault where complaining witness and Justice fraudulently prepared a biased jury list, stated a cause of action.

II.

PRIVILEGE

Appellees seek to emasculate the Act on grounds of privilege. It is now settled that mere private action does not give rise to violation.

Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 253, 1951.

Appellees then seek to close the door altogether by arguing that virtually every public official is absolutely immune. It is argued that the following are exempt: Prosecuting Attorney; Warden; Deputy Sheriff; Chief Assistant Prosecuting Attorney; Police Commissioner; Police Officers; Assistant State's Attorney; Court Reporter; Probation Officer; Police Chief;

Police Sergeant; Electrical Inspector. An analysis of cases cited reveal simple applications of rule, that: (1) Judges and Legislators are immune in virtually every situation; (2) Quasi-judicial officers are exempt only when carrying out an order of Court or making a judicial decision; (3) Ministerial offices are immune only when executing an order of Court without negligence.

Lewis v. Brautigam (CA 5), 227 F. 2d 124, 1950;
Cooper v. O'Connor, 69 App. DC 100, 99 F. 2d 135, 138;

43 *A. J. Public Officers* §277.

Wair argues that public officers acting within the scope of their duty, have tort immunity whether they act honestly or maliciously in all situations. This is not in accord with the cases and would wholly destroy the Act. The Courts have already recognized that mere private acts are not encompassed. If the law is also that all officers are exempt in all situations, the law would perish.

There is a conspicuous lack of agreement among appellees. Counsel for Keller does not mention privilege. Formerly attorney for Halden and Hansen, recent

District Attorney of Multnomah County, filed an action in the District Court (*Langley v. Thornton*, No. 8743) based upon the Civil Rights Law against appellee Wair's counsel, Oregon's Attorney General. He argued strenuously that privilege did not apply.

Immunity under the Act is discussed in great detail in a recent article in 68 Harvard L. R. 1229. The author recognized that if immunity is applied too extensively, the Civil Rights Laws will be destroyed. The author states (1230) :

"The recent decision in *Francis v. Lyman* not only expresses an awareness that the doctrine of immunity applied too broadly might vitiate the Civil Rights Acts, but also demonstrates the need for an examination of the reasons for reading immunity into those laws" * * * * (1231) :

"Even though many of the dismissals were based at least partly on the immunity of the defendant, in most of the cases the plaintiff's substantive claim itself was without merit, and therefore the language of the cases cannot be taken as an accurate description of the immunity doctrine's strength." (1232) : * * * * even though the policies in favor of immunity on liability under state law are still present when recovery is sought under the Civil Rights Acts, it seems clear that the purpose of the federal acts may on occasion override those policies. When a suit is based on deprivation of a federally guaranteed right, the need to enforce federal limitation on state action constitutes a consideration in favor of recovery which is not present in suits under state law. In order to determine

whether immunity should prevail in any given case, it is necessary to ascertain whether respect for state autonomy in the matter involved, coupled with traditional reasons for granting immunity to the type of officer involved, justify a restriction on the broad purposes of the Civil Rights Acts."

This is also recognized in 66 *Harvard L. R.* 1285, 1298 as follows:

"Although unlimited liability may be unwise, absolute immunity would be equally undesirable, for it would virtually deprive the Acts of all meaning insofar as they provide an action at law against state officials. It seems necessary, therefore, to reach some compromise in order to protect civil rights and still further independence of administration."

As previously conceded virtually all cases have held judges immune; *Bradley v. Fisher*, 13 Wall. 335, 80 U. S. 335, 20 L.Ed. 646, 1872; although even a judge is not absolutely immune in all circumstances.

Ex parte Virginia, 100 U. S. 339, 1880 (discrimination in selection of jurors);

Similarly, legislators have been exempt in virtually every situation;

Teeney v. Brandhove, 341 U. S. 367, 71 S. Ct. 385, 95 L.Ed. 1019, 1951.

although it has been suggested liability might be imposed if "there should be a series of legislative attempts to thwart federally guaranteed rights in this area, damages may prove to be the only effective means in preventing future attempts at infringement." 68 Harvard L.R. 1229, 1235.

These are the only classes where courts have extended almost absolute immunity. Even members of subordinate legislative bodies, such as aldermen and school board members, have only qualified immunity.

Cobb v. City of Malden (CA 1), 202 F.2d 701, 1953; 68 Harvard L.R. 1229, 1235.

On the other hand, quasi-judicial officers have received only limited protection and limited to situations where they were acting in the same way that a judge or legislator might act. It is stated in 66 Harvard L.R. 1285, 1298:

"It would seem that the Courts should place emphasis on the nature of the particular act which has allegedly deprived the plaintiff of his rights. An official should receive greater protection if he is acting in adjudicatory or quasi-legislative capacity. Almost all the arguments in favor of granting judicial and leg-

islative immunity apply equally to such an official; * * *

“Where the administrative action is not primarily adjudicative or quasi-legislative, only limited protection should be given.”

Immunity in Civil Rights cases tends to coalesce with immunity in other cases.

U. S. v. Tarumianz (D. C. Del.), 141 F. Supp. 739, 1956.

That rule is expressed 43 A. J. p. 86:

“Where an officer is vested with this discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given an immunity from liability to persons who may be injured as a result of an erroneous or mistaken decision, however erroneous his judgment may be, provided the acts complained of are done within the scope of the officer’s authority, and without willfulness, malice or corruption.”

38 A. L. R. 663, 90 A. L. R. 1423; 11 L.Ed. 506.

In this case the officers did not act within the scope of their authority but in derogation of it and in addition willfully and maliciously.

It has always been recognized that a quasi-judicial officer, who acts outside his jurisdiction or without authorization, is liable.

43 A. J. p. 89.

Ministerial officers are subject to even greater liability. They are liable when they act without proper authority, for willfulness or malice, for nonfeasance, and even negligence.

43 A. J. p. 90-91.

In this case it is difficult to believe Halden or Hansen, who were merely instructed to bring appellant before the Judge, could be performing anything other than a ministerial duty. The same is true of Keller, who was merely instructed to make an examination. Acts of this kind have been given immunity only as long as in accordance with orders of Court. This they did not do and, in fact, did precisely the opposite.

Counsel for Halden and Hansen in final summation quotes Judge Hand in *Gregoire v. Biddle* (CA 2), 177 F. 2d 579, 580, where he recognized quasi-judicial officers enjoy similar protection with judges while exercising a discretionary function. This was most emphatically not absolute privilege. In *Burt v. City of New York* (CCA 2), 156 F. 2d 791, 1946, Hand stated that the Snowden decision may compel any "officer of the state * * * * to defend any action brought in the District Court * * * * in which the plaintiff, however irresponsible, is willing to make the

necessary allegations." Here the allegations are present and also utmost good faith. A registered architect, charged the City and its officials abused their power and denied his building permits and imposed unlawful conditions. This stated a cause of action. The same remedy should be available where personal liberty is infringed by denial of every protection granted by equal protection, due process and laws of his state. Surely human rights are as sacred as property rights!

III.

STATUTE OF LIMITATIONS

Only two appellees raise this question.

District Judge East declined to pass on this issue. (Tr. 18-20). Judge Mathes declined to decide this question because he did not consider that he was "fully advised" (Supp. Tr. 38). He felt there were too many factual problems which could not be resolved without testimony.

No cross appeal was filed.

In any event limitations is not at bar because:

1. The complaint alleges continuing conspiracy which did not terminate until June 18, 1956.
2. Oregon Law provides that if when a cause of

action accrues, a person is insane or in execution for less than life, time of disability shall not be counted.

O. R. S. 12.160.

Hoffman was stripped of civil rights January 10, 1952, when adjudged mentally ill. Only by virtue of a hearing June 18, 1956, was he restored to civil rights and adjudged competent. Prior to that time he could not have instituted such an action without a guardian. F. R.C.P. 17(c). If he had requested a guardian, the Court would normally have appointed the Superintendent of Hospital. O.R.S. 126.135. Here Superintendent was appellee, Wair.

Kramer v. Sidlo (Tex. Civ. App.), 233 S.W. 2d 609, 1950 is analogous. Plaintiff was adjudged incompetent but later was restored to his status of sanity by the Court August 16, 1940. The Court concluded (LC 611):

“The statutes of limitation were suspended as to him until he was restored to sanity on August 16, 1949.”

3. Filed in the District Court is an extensive affidavit prepared by Hoffman January 15, 1955, relating circumstances of filing. This affidavit was not included in transcript or supplemental transcript. The action was filed in his behalf by George Gibson, not a mem-

ber of the bar and having no legal training. Hoffman accompanied Gibson and they filed the papers with the Clerk. They were advised to return Monday to the Marshal since filing occurred Saturday. On Monday Hoffman met Gibson and handed him the Marshal's charges. Gibson assured him this would be done. However, Gibson became fearful that legal action would be taken against him. Later Gibson wrote directly to Judge Fee. The Judge was understandably disturbed and sent a strongly drafted reply. At call Gibson was apprehensive and did not appear. The case was dismissed. Hoffman didn't discover this fact for sometime. In the meantime, appellant attempted to obtain an attorney but had difficulty because the Probate Judge was originally a defendant.

Rule 3 provides a civil action is commenced by filing a complaint. Numerous cases have held an action is commenced for all purposes by filing with the Clerk, since issuance of summons is a ministerial act. The statute involved is a federal statute and federal rules should control.

Further Oregon Law provides that an attempt to commence an action "shall be deemed equivalent to the commencement thereof * * * * when the complaint is filed, and the summons delivered, with the intent that

it be actually served, to the Sheriff or other officer of the County which the defendants, or one of them usually or last resided." O.R.S. 12.030.

In accordance with the usual procedure the Clerk undoubtedly delivered the summons to the Marshal. Certainly Mr. Hoffman clearly intended action commence immediately.

If this Court feels Limitations is a serious issue, we suggest the complete affidavit be made available.

4. Limitations applicable is O.R.S. 12.080, which is six years for liability created by statute. The complaint charges deprivation of privileges, immunities, and equal protection. This is a creature of the Constitution.

IV.

DEVELOPMENT OF CIVIL RIGHTS

This case squarely presents the question whether the Act is to be relegated to cases of negro discrimination. Apparently appellees would even eliminate this by an all embracing privilege.

Researchers have revealed the first sentence of the Fourteenth Amendment, which made Negroes citizens, was added, almost as an afterthought, after the

amendment had left the Joint Committee on Reconstruction and had passed the house.

Flack, The Adoption of the Fourteenth Amendment, 1908.

The debates reveal consistently broad intention by framers of Civil Rights Law and Fourteenth Amendment.

Congressional Globe, 39th Congress, 1st Sess., 1088, 2511, 2462.

Appellees assume the purpose of the Act was to implement the Amendment. Actually debates demonstrate the purpose of the Fourteenth Amendment was to put the Civil Rights Act of 1866 beyond repeal.

50 Col. L.R. 131, 141.

That the Law was intended to cover such a situation is seen by remarks of Senator Howe, a prominent Republican at its adoption. He listed as elements of equal protection, right to hold land, right to collect wages, and right to appear in Court and give testimony, and stressed that "these are not the only rights." Later, the Slaughter-house Cases, 16 Wall. 36, 1873, Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 1883, and others

established a pattern of narrow debilitating construction.

50 Mich. L.R. 1323, 1342.

As a result "The scope and effectiveness of the civil rights statutes became progressively smaller as they were increasingly subject to the cold water of the judicial process." (L.C. 1342) and "* * * * the bold motives and the brave arguments of the architects of the constitutional revolution in civil rights were forgotten under the din of a judicial re-writing of their efforts." (L.C. 1337.)

However, there has been a strong recent trend to return to original scope and meaning. As stated in *Valle v. Stengel* (CA 3), 176 F. 2d 697, 702, 1949:

"Any narrow interpretation of the Civil Rights Act has been obliterated, we think, by the *Screws* decision."

There was also an expansion of the criminal aspects. Prior to the establishment of the Civil Rights Section in the Department of Justice in 1939, Section 242 had lain virtually dormant and involved in only two reported cases. Since that time it has been applied in numerous decisions such as *U. S. v. Glass*, 313 U. S. 299, 61 S. Ct. 1031, 15 L. Ed. 1368, 1941; *U. S. v. Saylor*, 322 U. S. 385, 64 S. Ct. 1101, 1941; *Screws v. U. S.*, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R.

1330, 1945; *Williams v. U. S.*, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774, 1951. As a result there are "some encouraging signs in the application of some of those statutes to the broad rights which have come to be protected against state action under the due process clause."

50 Mich. L.R. 1323, 1357.

Furthermore, it has been suggested that § 1981 may be broader than § 1983 or § 1985.

50 Mich. L.R. 1323, 1356.

This action is brought under all of these provisions.

Recent statements have reaffirmed the original intent. In *Hague v. C.I.O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, 1939, Justice Stone stated the act:

"extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. This includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will be observed that they are those rights secured the persons whether citizens of the United States or not, to whom the amendment in turn extends the benefit of the due process and protection clauses."

A recent article in 26 Ind. L. J. stated, 379:

"That Courts are beginning to accord them the

scope and significance which Congress originally intended."

Governor F. F. Low of California in recommending ratification of Fourteenth Amendment said:

"this section declares equality before the law for all citizens is a solemn and binding form of Constitutional enactment, to which no reasonable objection can be urged." California S.J. 49, 1867-68.

The principal draftsman of the Civil Rights Bill, Senator Trumbull, stated during the debates:

"Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights or person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance with the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured." Congressional Globe, First Session, 39th Congress, 1st Ses. p. 77, 1866.

Clearly Adolph Hoffman was denied practically all fundamental rights.

If the Fourteenth Amendment and Civil Rights Laws have any meaning, it should apply to one denied the right to know charges against him, denied an attorney or witnesses, incarcerated in direct defiance of Court, the subject matter of false affidavit, not been

informed of charges against him and whose other rights have been curtailed.

As further evidence of this trend the following cases have recently found violations of the Act:

1. *Brown v. U. S.* (CA 6), 204 F. 2d 247, 1953. A private citizen, who conspired with a Deputy Sheriff to cause the arrest and imprisonment of inhabitants for the purpose of extortion.

2. *U. S. v. Jackson* (CA 8), 235 F. 2nd 925, 1956. A prison guard wilfully beat and injured a prisoner administering illegal summary punishment with intent to deprive him of federal rights.

3. *Koehler v. U. S.* (CA 5), 189 F. 2d 711, 1951. A constable and deputy beat a prisoner, threatened him, abused him, and failed to lodge a proper charge against him. (Criminal case.)

4. *Gordon v. Garrson* (D.C.E.D. Ill.), 77 F. Supp. 477, 1948. During a prison break in which he had no part, plaintiff was inadvertently mistaken for another prisoner, and seriously injured by third persons. He charged the Superintendent by solitary confinement, refusal to supply proper food or medical aid, caused him to suffer permanent injuries.

V.

SUMMARY

The policy described as "judicial negation" (50 Mich. L.R. 1323, 1340) has been arrested and more realistic interpretation applied. There is a marked trend to return to standards the drafters intended. The standards are still strict, but not impossible. The following must be present:

1. Action under color of law not merely individual action;
2. Purposeful, systematic, and intentional discrimination;
3. Inequality of treatment;
4. Not privileged or compelled by law;
5. Damages.

Each element is pleaded. Under fundamental rules they must be assumed true for purposes of motion to dismiss. While all facts which could be offered have not been set out there are sufficient factual averments to show intentional systematic discrimination and considerably more than required by notice pleading. He was deprived of virtually every constitutional safeguard. Oregon law was violated at least nine ways. *McCollum v. Mayfield* (D.C.N.D. Cal.), 130 F. Supp. 112, 1955

is instructive. An action was brought under the Law by plaintiff, who was held in the jail awaiting trial, against sheriff, deputy and county jailer, who forced plaintiff to wash shelves in the county jail in violation of California law forbidding labor on a public work until final judgment. Plaintiff charged they also refused medical care. This stated a cause of action. Judge Oliver Carter stated (LC 115) :

“In this connection it is immaterial that the complaint is based in part on allegations of a failure or refusal to act, rather than an affirmative wrongful act. Furthermore, the alleged wrong is properly described as being done under color of State authority despite of the fact that the officials involved allegedly exceeded their authority or acted (or failed to act) in contravention with the dictates of their duty.”

This is very similar.

The complaint contains every element. If the Court should refuse appellant the right to present facts to substantiate his pleading, it will nullify the act. Three appellees hide behind immunity despite their violation of express orders of Court. Immunity extends to quasi-judicial officers only where they act as directed by the judiciary or make judicial determinations.

Apparently Courts have been hesitant to apply the literal language of the Act in all situations because

fearful of the extent of Federal supervision over state conduct. A recent article has suggested that rather than strike down every complaint, a clear frustration of the Act, it would be best to transfer to civil cases the "Screws test of actual intent to violate Constitutional rights." 68 Harv. L. R. 1236. Another article in 66 Harv. L. R., 1285, 1298, recognized this as follows:

"It is not surprising that the federal courts, confronted with an increasing volume of litigation, have hesitated to undertake the extensive supervision over state affairs envisaged by a Congress faced with the problems of the Reconstruction Era. Nevertheless, it is important that the Acts do not become a nullity, for Congress appears reluctant to provide new civil rights legislation."

Individuals charged with mental illness are entitled to minimal protection.

Respectfully submitted,

ROGER TILBURY
ALEXANDER, BUEHNER & TILBURY
606 Executive Building
Portland 4, Oregon

No. 15788 ✓

United States
Court of Appeals
For the Ninth Circuit

See: Vol. 3054

CITY OF ANCHORAGE, a Corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED
JUN 21 1958



No. 15788

**United States
Court of Appeals**
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CITY OF ANCHORAGE, a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant, City of Anchorage:

JAMES M. FITZGERALD,

City Attorney;

L. EUGENE WILLIAMS,

Assistant City Attorney,

Box 400, Anchorage, Alaska.

For the Appellee, Alaska Dairy Products:

MANDERS, BUTCHER, DUNN &

CONNOLLY;

JOHN C. DUNN,

First National Bank Bldg.,

Anchorage, Alaska.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297-C

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORP.,

Defendant.

COMPLAINT

Comes Now the City of Anchorage, plaintiff herein, and for cause of action against the defendant, alleges as follows:

I.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situated in the Third Judicial Division thereof.

II.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

III.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein

as if fully set forth. The defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and in consideration thereof the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

IV.

Plaintiff alleges that according to this contract said payment in lieu of taxes to be paid to the City was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

V.

Plaintiff alleges that the defendant has paid to the City, Six Hundred Fifty and 25/100 Dollars (\$650.25) which is a payment in lieu of real property taxes.

VI.

Plaintiff alleges that defendant's personal property has an assessed value of Forty-Six Thousand Dollars (\$46,000) on which amount the personal property taxes due the City would be in the amount of Four Hundred Sixty Dollars (\$460.00).

VII.

That one-half of the said sum of Four Hundred Sixty Dollars (\$460.00) became due and payable on or before the 15th day of February, 1956, and that if said first installment was not paid on said date the entire amount of tax became delinquent. That said

defendant did not pay the first one-half thereof by the date aforesaid, and that, therefore, the entire amount of tax became delinquent on the 16th day of February, 1956.

VIII.

That under the terms of said contract, defendant is indebted to plaintiff in the amount of Four Hundred Sixty Dollars (\$460.00).

IX.

That plaintiff has made demand on the defendant that the above amount be paid.

X.

Defendant has failed to pay the above amount as agreed to in the attached contract.

Wherefore, plaintiff prays for judgment against the defendant in the amount of Four Hundred Sixty Dollars (\$460.00); court costs incurred, attorney's fees, and for such other relief as to the court may seem equitable in the premises.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 11, 1956, U. S. Commissioner.

EXHIBIT A

Agreement
(Sewer Oustide City Limits)

This Agreement, made and entered into this 18th day of May, 1955, by and between the City of Anchorage, a municipal corporation, hereinafter referred to as the "City," and Alaska Dairy Products Corporation, hereinafter referred to as the "Owner";

Witnesseth:

1. The City will permit the owner to connect the property hereinafter described in Paragraph 2 of this agreement to the City sewer system under the conditions and provisions as set out herein.

2. The property, which the owner may connect to the City sewer system, is described as follows:

Lots 10, 11, Block 14A, East Addition to the City of Anchorage.

3. The owner will pay the City One Hundred Eighteen and 46/100 Dollars (\$118.46) as a hook-on fee. In addition to this hook-on fee, the owner will make annual payments in lieu of taxes to the City. Said payments in lieu of taxes to be equal to the total City levy, less the School District levy included therein. The payments, as provided in this section, shall be due when the City property taxes are due and collected in the same manner.

4. The owner shall install and maintain the sewer as provided in this agreement at his own expense.

and the City under no circumstances shall be liable for any debt contracted for the installation and maintenance of the sewer lines.

5. The City reserves the right to inspect the sewer installed as set forth herein at all times and may discontinue the rendering of said services upon failure to pay the amount as specified in Paragraph 3, or upon failure to perform any other condition as set out in this agreement.

6. The owner will submit plans for the sewer to the City Engineer for approval, prior to the installation, and shall perform all work in installing and maintaining the sewer system as set out in this agreement according to the specifications required by the Engineer.

7. Payment, as set out in this agreement, shall not preclude the City of Anchorage from levying special assessments for the installation and maintenance of sewer facilities, and owner agrees to said assessment as though the facilities herein provided did not exist.

8. The owner will secure approval from the Fairview Public Utility District for the installation of this sewer, before any work is commenced under the provisions of this agreement.

9. The covenants and conditions herein contained shall be binding upon the owner, his transferees, assignees, and successors in interests.

The word "owner" as used herein includes persons, firms and corporations, both plural and singular.

Dated at Anchorage, Alaska, the day and year first above written.

CITY OF ANCHORAGE,

By /s/ GEORGE C. SHANNON,
City Manager.

ALASKA DAIRY PRODUCTS
CORP.,

By /s/ GEORGE D. JACKSON,
Owner.

Executed in the presence of:

/s/ ELIZABETH KERBY,

/s/ ERNEST P. LaBATE.

United States of America,
Third Judicial Division,
Anchorage Recording Precinct,
Territory of Alaska—ss.

Before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned, qualified, and sworn as such Notary Public, this day personally appeared George C. Shannon, known to me personally to be the City Manager of the municipal corporation that executed the within instrument, and he acknowledged to me that the said instrument

was the voluntary act and deed of the said municipal corporation, and that his act of executing said instrument on behalf of said municipal corporation was duly authorized by ordinance/resolution passed by the City Council of said municipal corporation.

Witness my hand and Notarial Seal this 18th day of May, 1955.

[Seal] ERNEST P. LaBATE,
Notary Public in and for
Alaska.

My commission expires: 5/18/57.

United States of America,
Third Judicial Division,
Anchorage Recording Precinct,
Territory of Alaska—ss.

Before the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned, qualified and sworn as such Notary Public, this day personally appeared, at Anchorage, Alaska, George D. Jackson, each/ to me personally known, and known to me to be the person described in and who executed the above instrument, and he/they and each of them, severally/ acknowledged to me that he/they and each of them, respectively/executed said instrument freely and voluntarily, with knowledge of its contents, for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal this 18th day of May, 1955.

/s/ ERNEST P. LaBATE,
Notary Public in and for
Alaska.

My commission expires: 5/18/57.

[Duplicate agreement attached.]

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

ANSWER

Comes Now the defendant and answers the complaint of plaintiff herein in the manner following.

I.

Defendant admits the allegations set forth in paragraphs I to V, inclusive, of plaintiff's complaint.

II.

With respect to paragraph VI of plaintiff's complaint, defendant admits that the assessed value of its personal property is Forty-Six Thousand Dollars (\$46,000.00); however, defendant denies that it owes any money whatsoever to the City of Anchorage.

III.

With respect to paragraph VII of plaintiff's complaint, defendant admits that the allegations contained therein would be true if defendant, in fact, owed the City of Anchorage any money; however, defendant denies that it owes the City of Anchorage any money whatsoever.

IV.

Defendant denies the allegations set forth in paragraph VIII of plaintiff's complaint.

V.

Defendant admits the allegations set forth in paragraph IX of plaintiff's complaint.

VI.

With respect to paragraph X of plaintiff's complaint, defendant admits that it has failed to pay plaintiff; however, defendant denies that it has agreed to pay plaintiff.

Wherefore, defendant prays that plaintiff take nothing by virtue of its complaint filed herein and that defendant be awarded judgment against plaintiff for its costs and disbursements herein, including a reasonable attorney's fee and for such other relief as the court may deem just in the premises.

/s/ JOHN C. DUNN.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

STIPULATION

Comes now the plaintiff, through its attorney, L. Eugene Williams, and the defendant, through its attorney, John C. Dunn, and stipulate and agree as follows:

I.

That, attached hereto and marked Exhibit A, is a true copy of the letter written by defendant and delivered to plaintiff and that said letter is the first written evidence of the negotiations leading up to the written contract which is in dispute herein.

II.

That, attached hereto and marked Exhibit B, is a true copy of the minutes of the meeting of the City Council of plaintiff at which the execution of said contract was authorized and that said minutes accurately reflect what took place at said meeting of the City Council.

III.

That the contract attached to the complaint herein filed as Exhibit A is a true copy of the contract executed by plaintiff and defendant.

IV.

That the sewer line which is the subject of said contract has been installed and is in use.

V.

That, prior to the execution of said contract, it was mutually agreed between plaintiff and defendant that the Lot 12 mentioned in said letter and minutes of April 26, 1955, be excluded from said contract and that Lot 12 is in no way concerned with the matters in dispute herein.

VI.

That, except for the amount of money claimed by plaintiff to be owed plaintiff from defendant, the sole question to be decided herein is whether or not the word "property" as used in said contract means real property or whether it means real and personal property.

VII.

That the question of the meaning of the word "property" may be decided from the facts as stipulated herein and an examination of Exhibits A and B attached hereto, and of said contract; save and except that, in the event this Court rules that evidence is admissible as to the intent of the parties as to the meaning of "property" at the time of execution of said contract, plaintiff may call George Shannon, the City Manager, and B. W. Boeke, the City Clerk, to prove such intent of plaintiff, and defendant may call George Jackson, president of defendant, to prove the intent of defendant.

VIII.

That, should this Court decide that "property" means real property alone, judgment may be rendered in favor of defendant as prayed.

IX.

That, should this Court decide that "property" means real and personal property, there will, nevertheless, remain a question as to the amount of money which plaintiff is entitled to recover and that this amount, if any, will be determined at a later date, either by stipulation of the parties hereto or upon subsequent proof to be furnished this Court.

Dated at Anchorage, Alaska, December 10, 1956.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff.

/s/ JOHN C. DUNN,
Attorney for Defendant.

EXHIBIT A

Page 3

April 26, 1955.

Mr. George Shannon,
City Manager,
City of Anchorage,
Anchorage, Alaska.

Dear Mr. Shannon:

We request permission to install a sewer connection from our dairy, 931 East Sixth Avenue, to the existing sewer line on Sixth Avenue between Gambell and Fairbanks.

We understand the conditions and agree to the following:

1. We will pay in lieu of taxes a sum equal each year, we are connected to the City of Anchorage sewer, to taxes on our property which consist of Lots 10, 11, and 12 in Block 14A of the East Addition.

2. We will install and maintain the above sewer line at our expense.

3. We will complete the Sixth Avenue portion of the sewer line within the city limits, before, and in time, to not hinder the paving of this street.

4. We agree that the installation of this sewer line will not exempt us from any present or future sewer assessment or improvement district of the City of Anchorage or others.

Plans for the construction of this sewer line have been submitted, by us, to the City Engineer.

Yours very truly,

ALASKA DAIRY PRODUCTS
CORP.,

GEORGE D. JACKSON.

GDJ:jn

EXHIBIT B

Page 4

Minutes of the Regular Meeting of the City Council
Held on April 26, 1955, at 8:00 P.M.

The meeting was called to order by Mayor Taylor and the following councilmen reported present: Peterson, White, Engebret, A. Anderson, Davis.

Absent: J. Anderson. City officials present: Manager, Attorney, Chief of Police, Building Inspector, Telephone Superintendent, Comptroller, Planning Director, Clerk.

* * *

“The City Manager read a letter from Mr. George Jackson representing the Alaska Dairy Products Corporation, 931 East Sixth Avenue, requesting permission to install a sewer connection from the dairy, 931 East Sixth Avenue, to the existing sewer line on Sixth Avenue between Gambell and Fairbanks Streets, and agreeing to the following: 1. To pay in lieu of taxes a sum equal to taxes on their property, consisting of Lots 10, 11 and 12, Block 14A, East Addition, for each year they are connected to the City sewer. 2. To install and maintain the above sewer line at their own expense. 3. To complete the Sixth Avenue portion of the sewer line within the City limits before, and in time, not to hinder the paving of this street. 4. That the installation of this sewer line will not exempt them from any present or future sewer assessment or improvement district of the City of Anchorage or others.

“It was moved by White and seconded by A. Anderson that the request of the Alaska Dairy Products Corporation, to install a sewer connection from their plant at 931 East Sixth Avenue to the existing sewer line on Sixth Avenue between Gambell and Fairbanks Streets, be approved under the conditions, Items 1, 2, 3, and 4 outlined above, as per their letter of April 26, 1955. All voted in the affirmative.”

* * *

Certificate.

I, B. W. Boeke, City Clerk—Treas. of the City of Anchorage, Alaska, keeper and custodian of the records of said city, do hereby certify that the following is a true, full and correct excerpt of the Minutes of the City Council held on April 26, 1955.

Witness my hand and the seal of the City of Anchorage, Alaska, this 27th day of August, 1956.

.....,
B. W. BOEKE,
City Clerk-Treas.

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

JUDGMENT

This Matter came before the Court December 10, 1956, at which time plaintiff appeared through its Assistant City Attorney, L. Eugene Williams, and through its City Manager and City Clerk, and defendant appeared through its attorney, John C. Dunn, and its President; and counsel for the respective parties hereto having filed herein a stipulation with respect to various relevant facts; and each

party hereto having produced witnesses and adduced testimony in support of their respective contentions; and the Court being fully informed.

Now, Therefore, it is hereby ordered, adjudged and decreed that plaintiff take nothing by virtue of its complaint filed herein; that judgment is hereby entered in favor of defendant; and that defendant recover from plaintiff a reasonable attorney's fee of Sixty-Nine and no/100 Dollars (\$69.00).

Done in Open Court at Anchorage, Alaska, this 2nd day of Jan., 1957.

[Seal] /s/ WARREN C. COLVER,
Ex-Officio Justice of the Peace.

Copy received and approved for entry January 2, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff.

1/2/57—Oral notice of appeal given this date—
(W.C.C.) in open Court.

[Endorsed]: Filed Jan. 2, 1957.

In the District Court for the District of Alaska
Third Division

No. A-13,001

CITY OF ANCHORAGE, a Municipal Corporation,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORP.,

Defendant.

MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT

Plaintiff moves the court for leave to file an amended complaint, a copy of which is attached hereto.

Plaintiff on or about the 11th day of October, 1956, filed a complaint in the Justice Court against Alaska Dairy Products Corp. Judgment was obtained by the defendant and said cause was appealed to this court. The Justice Court is a court of limited jurisdiction and the remedy of declaratory judgment which is available under the Federal Rules is not available in that court and the allowance of an amended complaint will eliminate the need to file a separate action.

The Justice Court is a court of limited jurisdiction and the equitable remedy of reformation was not available, and the facts as presented in the

amended complaint may entitle plaintiff to a reformation.

Legislation passed by the 1957 Legislature raised a further question which was not litigated in the court below.

Subsequent to the filing of this complaint and the decision therein in the Justice Court, plaintiff has had trouble with certain other of its contracts, similar in nature to this one, and the duly elected council of the City of Anchorage is desirous of putting to rest the problems concerned with the services rendered under this and other similar contracts.

Wherefore, plaintiff respectfully prays that leave may be granted to file an amended complaint in this cause alleging the matters of fact as they appear in the amended complaint hereto attached.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Points and authority: Rule 15A, Federal Rules of Civil Procedure.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Comes Now the City of Anchorage, plaintiff herein, and for first claim for relief against the defendant alleges as follows:

I.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situate in the Third Judicial Division thereof.

II.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

III.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein as if fully set forth, wherein defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and, in consideration thereof, the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

IV.

Plaintiff alleges that according to this contract, said payment in lieu of taxes to be paid to the City, was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

V.

Plaintiff is now and was at all times material to this action performing under the terms of the contract and is furnishing sewer facilities to the defendant.

VI.

Plaintiff alleges that the defendant has paid to the City, Six Hundred Fifty and 25/100 (\$650.25) which is a payment in lieu of real property taxes.

VII.

Plaintiff alleges that defendant's personal property has an assessed value of Forty-six Thousand Dollars (\$46,000) on which amount the personal property taxes due the City would be in the amount of Four Hundred Sixty Dollars (\$460.00).

VIII.

That under the terms of said contract, defendant is indebted to plaintiff in the amount of Four Hundred Sixty Dollars (\$460.00).

IX.

That plaintiff has made demand on the defendant that the above amount be paid.

X.

Defendant has failed to pay the above amount as agreed to in the attached contract.

Comes Now the plaintiff herein and for second claim for relief in the alternative alleges:

I.

Plaintiff realleges paragraphs I, II, III, IV, and V of the first claim for relief.

II.

Prior to the execution of said agreement, defendant had agreed and understood that the payment by the defendant to the plaintiff for services to be rendered would be equal to the total City levy including real and personal property taxes which would be paid by the defendant were he located within the City limits of Anchorage.

III.

That by mutual mistake of the plaintiff and the defendant the said written agreement did not embody the actual agreement if the wording in Paragraph 3 of the contract means other than was stated in the paragraph preceding this.

IV.

The plaintiff through its duly authorized agent, the City Manager, acting under the direction of the City Council executed the agreement which did not embody the actual agreement as hereinabove alleged.

V.

Plaintiff's City Manager followed the direction and intent of the Council in so attempting to contract.

Comes Now the plaintiff herein and for third claim for relief in the alternative alleges:

I.

Plaintiff herein files this amended Complaint for Declaratory Judgment under Federal Declaratory

Judgment Act, 28 USCA, Section 2201, against the defendant, Alaska Dairy Products Corporation, and avers as follows:

II.

Plaintiff realleges Paragraphs I, II, III, IV, and V of first claim for relief.

III.

An actual controversy of a justiciable nature exists between plaintiff and defendant, involving their rights and liabilities under a contract entered into between them, and dependent upon the construction of their contract, which controversy may be determined by a judgment in this action, without other suits.

IV.

That this contract was entered into by the City Manager with authority from the duly elected and qualified council during the year 1955.

V.

Plaintiff alleges that the furnishing of sewer services by the City of Anchorage is performing a governmental function.

VI.

Plaintiff alleges that it has other contracts of similar nature and the determination of rights and liabilities of this contract will settle questions arising under these other contracts and avoid the necessity of multiple litigation.

VII.

Plaintiff, City of Anchorage, through its present duly elected counsel, has expressed a desire to terminate these contracts as being burdensome and causing financial loss which is not to the best interests of the City of Anchorage and therefore not in the best interests of the citizens of the City.

VIII.

Plaintiff, City of Anchorage, can only act within the limits of authority delegated it by the Territory of Alaska.

IX.

Plaintiff alleges that the furnishing of sewage facilities to persons outside the city limits of Anchorage may have been outside the scope of the authority delegated to the City and contracts made thereunder may be void or voidable.

Wherefore, plaintiff prays that it may have judgment against the defendant as follows:

1. That judgment be entered against the defendant in the amount of Four Hundred and Sixty Dollars (\$460.00) plus court costs and attorney's fees, or
2. That by decree of this court, the hereinabove-mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties, and
3. That the Court declare the rights and duties of said contract of May 18, 1955, and the controversy

stated in this complaint and determine the following:

a. Whether or not the City of Anchorage had authority to enter into such agreement.

b. If the City had no authority to enter into such agreement, determine that this agreement is void or voidable.

c. Declare that the present City Council is not bound by a contract to perform governmental functions made by a previous Council and therefore may terminate this agreement without liability.

.....,
L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

MINUTE ORDER OF JUNE 14, 1957, DENYING
MOTION TO FILE AMENDED COM-
PLAINT

Now at this time, upon the Court's motion:

It Is Ordered that the motion to file amended complaint in the above cause be and hereby is denied.

In the District Court for the District
of Alaska, Third Division

No. A-13,503

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORPORA-
TION,

Defendant.

COMPLAINT FOR DECLARATORY
JUDGMENT AND OTHER RELIEF

Comes Now the City of Anchorage, plaintiff
herein, and for first claim for relief against the
defendant alleges as follows:

I.

Plaintiff herein files this amended Complaint for
Declaratory Judgment under Federal Declaratory
Judgment Act, 28 USCA, Section 2201, against the
defendant, Alaska Dairy Products Corporation, and
avers as follows:

II.

An actual controversy of a justiciable nature ex-
ists between plaintiff and defendant, involving their
rights and liabilities under a contract entered into
between them, and dependent upon the construction
of their contract and dependent upon the validity

of their contract, which may be determined by a judgment in this action, without other suits.

III.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situate in the Third Judicial Division thereof.

IV.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

V.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein as if fully set forth, wherein defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and, in consideration thereof, the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

VI.

Plaintiff is now and was at all times material to this action performing under the terms of the contract and is furnishing sewer facilities to the defendant.

VII.

That this contract was entered into by the City Manager with authority from the duly elected and qualified Council during the year 1955.

VIII.

Plaintiff alleges that the furnishing of sewer services by the City of Anchorage is performing a governmental function.

IX.

Plaintiff alleges that it has other contracts of similar nature and the determination of rights and liabilities of this contract will settle questions arising under these other contracts and avoid the necessity of multiple litigation.

X.

Plaintiff, City of Anchorage, through its present duly elected Council has expressed a desire to terminate this contract as being burdensome and causing financial loss which is not to the best interests of the citizens of the City, but cannot do so without a determination by the Court of its right to do so without subjecting the City to possible liability.

XI.

Plaintiff, City of Anchorage can only act within the limits of authority delegated it by the Territory of Alaska; such powers are found generally in 16-1-35 ACLA 1949.

XII.

Plaintiff alleges that the furnishing of sewage facilities to persons outside the city limits of Anchorage was outside the scope of the authority delegated to the City and contracts made thereunder were void.

Comes Now the plaintiff herein and for second claim for relief alleges:

I.

Plaintiff realleges Paragraphs III, IV, V, and VI of the first claim for relief.

II.

Plaintiff alleges that, according to this contract, said payment in lieu of taxes to be paid to the City, was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

III.

Prior to the execution of said agreement, defendant had agreed and understood that the payment by the defendant to the plaintiff for services to be rendered would be equal to the total City levy including real and personal property taxes which would be paid by the defendant were he located within the City limits of Anchorage.

IV.

That by mutual mistake of the plaintiff and the defendant the said written agreement did not embody the actual agreement if the wording in Paragraph 3 of the contract means other than was stated in the paragraph preceding this.

V.

The plaintiff through its duly authorized agent, the City Manager, acting under the direction of the

City Council, executed the agreement which did not embody the actual agreement as hereinabove alleged.

VI.

Plaintiff's City Manager followed the direction and intent of the Council in so attempting to contract.

Wherefore, plaintiff prays that it may have judgment against the defendant as follows:

1. That by decree of this court, the hereinabove-mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties, and

2. That the Court declare the rights and duties under contract of May 18, 1955, and the controversy stated in this complaint and determine the following:

- a. Whether or not the City of Anchorage had authority to enter into such agreement.

- b. That the City had no authority to enter into such agreement, and, therefore, determine that this agreement is void.

- c. Declare that the present City Council is not bound by a contract to perform governmental functions made by a previous Council and, therefore, may terminate this agreement without liability.

3. For Court costs incurred, reasonable attorney's fees, and for such other and further relief as

to the Court seems just and equitable in the premises.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

[Agreement—see pages 6 to 8 of this printed record.]

[Endorsed]: Filed June 17, 1957.

[Title of District Court and Cause.]

No. 13-503

MOTION TO DISMISS

Comes Now the Defendant, through its attorneys, Manders, Butcher, Dunn & Connolly, and moves the Court to dismiss the above-entitled action for the following reasons:

(a) The Complaint filed herein fails to state a claim upon which relief can be granted plaintiff against defendant;

(b) All matters raised by the Complaint filed herein have already been decided by this Court;

(c) Plaintiff is barred from raising the matters complained of herein by virtue of *res adjudicata* and improper joinder;

(d) The Complaint filed herein is nothing more

than an attempt to avoid the effect of a previous order of this Court.

/s/ JOHN C. DUNN,
Attorney for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 29, 1957.

[Title of District Court and Cause.]

No. 13-503

MEMORANDUM SUPPORTING
DEFENDANT'S MOTION TO DISMISS

* * *

Plaintiff has waived whatever rights it may have initially had to seek the relief requested in 13-503 by virtue of having filed the original action numbered 10-297C before the U. S. Commissioner for the Anchorage Precinct and then appealing the same to this Court as 13-001.

* * *

Respectfully submitted.

/s/ JOHN C. DUNN, of
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1957.

[Title of District Court and Cause.]

No. A-13,503

MINUTE ORDER OF SEPT. 5, 1957,
RENDERING ORAL DECISION

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Now at this time, arguments having heretofore and on the 12th day of August, 1957, been had in the above cause, and the Court having reserved its decision,

Whereupon, Court now renders its oral decision, and now grants motion to dismiss, with prejudice for the reason a declaratory judgment act is procedural and does not create new rights upon a cause of action previously decided. Issues decided in initial action filed by a party are conclusively determined as between the parties under the doctrine of res judicata, and the Court directs counsel for movant to prepare and submit written order accordingly.

[Title of District Court and Cause.]

No. 13-503

MOTION AND JUDGMENT OF DISMISSAL
WITH PREJUDICE

This matter came before the Court on August 12, 1957, on the motion of Defendant, through its at-

torneys Manders, Butcher, Dunn & Connolly; at which time Defendant appeared through his said attorneys and Plaintiff through its Assistant City Attorney Mr. L. Eugene Williams, Esq.; and, at which time the Court heard argument and examined authorities advanced and presented by counsel for all parties hereto, and being fully informed,

Now, therefore, it is hereby Ordered, Adjudged and Decreed that the above-entitled action be, and the same hereby is, dismissed with prejudice; and

It is further ordered, adjudged and decreed that Defendant is granted judgment against Plaintiff herein for his costs in defending this action which consists of an attorney's fee which is hereby assessed in the amount of \$75.00.

Done in Open Court at Anchorage, Alaska, this 12th day of September, 1957.

/s/ J. L. McCARREY, JR.,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered Sept. 12, 1957.

[Title of District Court and Cause.]

No. 13,503

OBJECTIONS TO PROPOSED JUDGMENT

Plaintiff objects to Paragraph 2 of the proposed judgment of dismissal for the reason that it fails to

set out the reasoning and language contained in the minute order.

Dated at Anchorage, Alaska, this 16th day of September, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

9-17-57.

Objection is overruled since the reason for the court's ruling was given in its oral opinion and a judgment is not a proper document to incorporate findings and conclusions.

/s/ J. L. McC.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1957.

[Title of District Court and Cause.]

No. A-13,503

NOTICE OF APPEAL

To: The Clerk of the District Court, Third Division,
District of Alaska:

Sir:

Notice is hereby given that the City of Anchorage, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the District Court for

the Third Division, District of Alaska, dismissing with prejudice as prayed for by Alaska Dairy Products Corporation, the action of the City of Anchorage, which action was dismissed on the 12th day of September, 1957.

/s/ L. EUGENE WILLIAMS,

Attorney for Plaintiff City of
Anchorage.

[Title of District Court and Cause.]

No. A-13,503

STATEMENT OF POINTS RELIED ON

1. The court erred in not allowing plaintiff to amend its complaint after appeal from Justice Court in Cause No. 13,001.
2. The Justice Court is a court of limited jurisdiction and its jurisdiction is statutory.
3. Additional relief sought by plaintiff in District Court after appeal from Justice Court where trial is de novo was not available in the court below.
4. The Court erred in granting defendant's Motion to Dismiss.
5. The Court erred in ruling plaintiff's claim for relief was previously determined by Justice Court.

6. The Justice Court has no equitable jurisdiction.

7. The Justice Court had no jurisdiction to try an action for declaratory judgment.

8. The pleadings in Justice Court did not plead a claim for relief in the nature of reformation.

9. The pleadings and original action in Justice Court pleaded no claim for relief under the Declaration Judgment Act.

10. The judgment for defendant is contrary to law.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 3, 1957.

[Title of District Court and Cause.]

No. A-13,503

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure and the designation of counsel for the plaintiff-appellant and coun-

sel for the defendant-appellee, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment of Dismissal filed and entered in the above-entitled cause by the above-entitled court on September 12, 1957.

Dated at Anchorage, Alaska, this 5th day of November, 1957.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15788. United States Court of Appeals for the Ninth Circuit. City of Anchorage, a Corporation, Appellant, vs. Alaska Dairy Products Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed November 7, 1957.

Docketed November 15, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The Appellant herein makes the following statement of points:

1. The court erred in not allowing appellant to amend its complaint after appeal from Justice Court in Cause No. A-13,001.

2. The Justice Court is a court of limited jurisdiction and its jurisdiction is statutory.

3. Additional relief sought by appellant in District Court after appeal from Justice Court where trial is de novo was not available in the court below.

4. The court erred in granting appellee's Motion to Dismiss.

5. The court erred in ruling appellant's claim for relief was previously determined by Justice Court.

6. The Justice Court has no equitable jurisdiction.

7. The Justice Court had no jurisdiction to try an action for declaratory judgment.

8. The pleadings in Justice Court did not plead a claim for relief in the nature of reformation.

9. The pleadings and original action in Justice Court pleaded no claim for relief under the Declaration Judgment Act.

10. The judgment for defendant is contrary to law.

/s/ JAMES M. FITZGERALD,

/s/ L. EUGENE WILLIAMS,

Attorneys for Appellant, City
of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 15, 1957.

In the United States Court of Appeals
for the Ninth Circuit

No. 15788

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORA-
TION,

Appellee.

DESIGNATION OF RECORD

Appellant, City of Anchorage, by its attorneys, hereby designates under Rule 17 (6) of the United States Court of Appeals, Ninth Circuit, and Rule 75 of the Federal Rules of Civil Procedure, the fol-

lowing to constitute the transcript of record on appeal in the above-entitled case:

Name of Instrument and Date Filed or Entered

1. Complaint in Cause No. A-13,001 as originally filed in Justice Court in Cause No. 10,297C and exhibit attached to Complaint, October 11, 1956.

2. Answer to Cause No. A-13,001 as originally filed in Justice Court in Cause No. 10,297C, December 10, 1956.

3. Judgment entered in Justice Court appearing in transcript of appeal in Cause No. A-13,001 with notation of oral Notice of Appeal, January 2, 1957.

4. Motion for Leave to File Amended Complaint and Amended Complaint Accompanying Motion, June 6, 1957.

5. Minute Order denying leave to file Amended Complaint, June 14, 1957.

6. Complaint in Cause No. A-13,503, June 17, 1957.

7. Defendant's Motion to Dismiss, June 29, 1957.

8. Minute Order rendering oral decision on Motion to Dismiss, September 5, 1957.

9. Defendant's Motion and Judgment of Dismissal With Prejudice, September 12, 1957.

10. Notice of Appeal, October 7, 1957.

11. Plaintiff's (appellant) Statement of Points,
October 25, 1957.

/s/ JAMES M. FITZGERALD,

/s/ L. EUGENE WILLIAMS,

Attorneys for Appellant, City
of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 15, 1957.

[Title of Court of Appeals and Cause.]

MOTION OF OBJECTION TO APPELLANT'S
DESIGNATION OF RECORD ON APPEAL

Comes Now the Appellee, through its attorney,
John C. Dunn, and moves the court to delete from
the record on appeal herein items 4 and 5 of the
Designation of Record on Appeal heretofore filed
by Appellant in the above-entitled court and cause.

This motion is made under Rule 15 of the above-
entitled court and is supported by a Memorandum
filed concurrently herewith.

/s/ JOHN C. DUNN,

Attorney for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1957.

[Title of Court of Appeals and Cause.]

MEMORANDUM SUPPORTING APPELLEE'S
MOTION OF OBJECTION TO APPELLANT'S DESIGNATION OF RECORD ON
APPEAL

Items 4 and 5 of Appellant's Designation of Record on Appeal are a motion for leave to file an amended complaint, the proposed complaint as amended, and a minute order denying leave to file an amended complaint. These items were filed in Civil Action 13,001 in the District Court for the Territory of Alaska, Third Division, Anchorage, Alaska.

This appeal and the sole matter before this court is taken in Civil Action numbered 13,503 by the District Court for the Territory of Alaska, Third Division, Anchorage, Alaska, a different and separate action from the one in which the order denying leave to file an amended complaint was entered.

This court has repeatedly held that only final orders are appealable. An order denying leave to file an amended complaint is not a final order, and, hence, not a proper subject of appeal. Should the refusal to permit the filing of an amended complaint constitute error, such would be a point to be raised on appeal, but only after the final determination of the case in which amendment of the complaint was sought; namely, in Civil Action 13,001, and not the action in which this appeal is taken.

The sole question before this court is whether or not the lower court erred in entering in judgment of dismissal in Civil Action 13,503.

No appeal has been taken in 13,001, from the order denying leave to file an amended complaint or otherwise; and the time of appeal has elapsed even if such an order were final and the proper subject of appeal. The minute order denying leave to file an amended complaint in 13,001 was entered June 14, 1957.

For these reasons, Appellee submits that said items 4 and 5 should be deleted from the record on this appeal.

/s/ JOHN C. DUNN,

Attorney for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1957.



No. 15,788

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

VS.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLANT.

JAMES M. FITZGERALD,

City Attorney of the City of Anchorage,

L. EUGENE WILLIAMS,

Assistant City Attorney of the City of Anchorage,

Box 400, Anchorage, Alaska,

Attorneys for Appellant.

FILED

MAR 10 1958

PAUL P. O'BRIEN, CLERK



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No. 15,788

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal taken from a final judgment in favor of Appellee and entered in the District Court for the Territory of Alaska, Third Judicial Division on the 12th day of September, 1957.

The District Court had jurisdiction by virtue of the Act of June 6, 1900, c. 786, Section 431, Stat. 322, as amended, 48 USCA Sec. 101. The United States Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the United States Code (as amended, October 31, 1951, c. 655, Sec. 48, 65 Stat. 726).

STATEMENT OF THE CASE.

The Appellant filed an action in the Justice Court for the Anchorage Precinct, Third Division, Territory of Alaska. The complaint alleged in substance, a contract between the Alaska Dairy Products and the City of Anchorage wherein the Alaska Dairy Products agreed to make a payment in lieu of taxes to the City of Anchorage in return for the City's furnishing certain sewer service. The payment to be made by Alaska Dairy Products, according to the City of Anchorage, was to be equal to the total tax on the Dairy's real and personal property. Alaska Dairy Products filed an answer admitting certain allegations but denying that it owed the City of Anchorage any amount of money, and denying it agreed to pay any amount covering personal property. A copy of the contract was attached to the complaint. Thereafter, a stipulation was entered into by the parties, that the sewer line was installed by the City and was in use, and further stipulated for purposes of the suit in the Justice Court that the sole question to be determined was whether or not property, as used in the contract meant real property, or real property and personal property.

Thereafter on January 2, 1957, a judgment was entered in favor of the Alaska Dairy Products. Oral notice of appeal was given by the City of Anchorage and the cause was now before the District Court for the Third Division.

Appellant moved for leave to file an amended complaint, attaching a copy of said complaint to its mo-

tion. Appellant alleged the same facts in its first claim for relief. Appellant then sought, by way of an amendment, the remedy of reformation in its second claim for relief. Appellant, as a third claim for relief, sought relief under the Declaratory Judgment Act (28 USCA, Sec. 2201) asking the District Court precisely whether or not the City was still bound by such a contract wherein they were performing a governmental function and also whether or not entering into this type of contract for services outside the City was within the scope of its authority under Territorial law.

Appellee, Alaska Dairy Products, filed a memorandum in opposition to Appellant's motion for leave to file an amended complaint. This motion was argued before the court and the court on the 14th day of June, 1957, by minute order, denied Appellant's leave to file an amended complaint.

Thereafter, the Appellant City filed a new complaint which became Cause No. A-13,503 seeking a declaratory judgment and certain other relief. The relief sought in this complaint is essentially the same as the second and third claims for relief in the proposed amended complaint in Cause No. A-13,001, seeking a declaratory judgment and reformation. Appellee, Alaska Dairy Products, thereafter filed a motion to dismiss, supported by a memorandum. The motion was heard by oral argument, and on the basis of the oral argument and the memorandums filed by both sides, the Court, by minute order on September 5, 1957, dismissed Appellant's complaint on the

grounds that it had previously been decided in the cause before the Justice Court, and ordered counsel to prepare written order accordingly. Appellee submitted a judgment dismissing Appellant's complaint ordering, adjudging and decreeing the action be dismissed with prejudice. Thereafter, the Appellant appealed to this Court by giving notice of appeal, filed in the District Court on the 7th day of October, 1957.

SPECIFICATION OF ERROR.

1. The Court erred in not allowing Appellant to amend its complaint after appeal from Justice Court in Cause No. A-13,001.

2. The Court erred in denying the additional relief sought by Appellant in District Court where trial is *de novo* and relief was not available in the Justice Court.

3. The Court erred in granting Appellee's motion to dismiss.

4. The Court erred in ruling Appellant's claim for relief was previously determined by Justice Court.

5. The pleadings in the original action in Justice Court pleaded no claim for relief under the Declaratory Judgment Act, nor sought reformation.

6. The Justice Court is a court of limited jurisdiction and had no jurisdiction to try causes seeking equitable relief.

7. The issues raised by the pleadings in this case were not determined by the judgment in the Justice Court.

8. The pleading in this case pleaded new causes of action not previously determined.

ARGUMENT AND AUTHORITIES.

ARGUMENT I.

THE COURT ERRED IN NOT ALLOWING PLAINTIFF TO AMEND THE COMPLAINT AFTER AN APPEAL WAS PERFECTED FROM THE JUSTICE COURT.

Rule 15(a) of the Federal Rules of Civil Procedure requires leave of court to amend a complaint after responsive pleading has been served. The motion for leave to file an amended complaint was urged in the District Court (TR p. 19).

The reasons for such amendment were stated in the motion, the chief reason being to allow the Appellant to try in one action already begun, all the matters in dispute with the Appellee. The general test, and it would seem the best test for allowing or disallowing amendments of pleadings, is whether or not justice would be promoted by the proposed amendment (*Securities and Exchange Commission v. Universal Services Association*, 106 F. 2d 232, cert. denied, 308 U.S. 622, 84 L.Ed. 519, 60 S.Ct. 378). Also important in deciding such a motion is whether or not any injustice is worked on the opposing party by allowing the amendment (*Fierstein v. Piper Aircraft*, 79 F. Supp. 217). No claim of prejudice was made or could the Appellee urge that any injustice be worked by allowing such an amendment. As is pointed out in Appellee's memorandum supporting the motion of objec-

tion to Appellant's designation of record on appeal (TR p. 44). Allowance or disallowance of an amendment is discretionary and not a final or appealable order. Appellant however, urges this point to properly put before this Court the background of the case. The complaint and necessarily the judgment in the first case, which became Cause No. 13,001 after appeal from the Justice Court (TR p. 3) is before this Court because it must necessarily be a portion of the record as the District Court ruled that the issues decided by the judgment in that cause precluded relitigating the issues raised in the complaint filed in Cause No. 13,503 (TR p. 27) as they had already been decided in the Justice Court and therefore would be *res judicata*.

Amendments to complaints after an appeal from the Justice Court are also governed in Alaska by Section 68-9-14, ACLA 1949 which section is as follows:

AMENDMENTS: FORMAL PLEADINGS.

In all cases of appeal the bill of items of the account sued on, or filed as a counterclaim or set-off, or the abatement of the plaintiff's cause of action, or of the defendant's counterclaim or set-off, or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any defect, deficiency, or omission therein, by filing formal pleadings therein when by such amendment substantial justice will be promoted; and in all cases when required by the court, or by either party to the action, formal pleadings shall be filed on either side upon the trial of the cause on appeal; when

either party requires such formal pleadings he shall cause to be served on the opposite party a notice thereof in writing, and file the same in the court where the cause is pending by the first day of the term of such court at which such cause is to be tried; but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment.

This section was urged by the Appellee in opposing the motion for leave to file an amended complaint. Though no reasons were stated in the minute order (TR p. 26) denying leave to file an amended complaint, it might be assumed that the District Court decided the motion on the basis of the last portion of that section, which is, “. . . but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment.” If this was the portion of the statute that the District Court relied on in denying the motion for leave to file an amended complaint, the denial of the motion would have been proper. But then we are faced with the problem of how the Court could then rule that the claim for relief urged in the complaint in Cause No. 13,503 (TR p. 27) had been previously decided by the Justice Court as the court ruled in the minute order (TR p. 34). In other words, if the Court decided that the amended complaint urged new claims for relief and therefore by virtue of the above quoted section these new claims were not proper to be added by amendment, how then could the Court say that these claims or causes of action had already been decided.

ARGUMENT II.

THE JUSTICE COURT FOR THE TERRITORY OF ALASKA IS A COURT OF LIMITED JURISDICTION, ITS JURISDICTION IS GOVERNED BY STATUTE AND THE CLAIMS FOR RELIEF PLEADED IN CAUSE NO. 13,503 COULD NOT HAVE BEEN BROUGHT IN THE JUSTICE COURT.

The jurisdiction of the Justice Court is stated in Section 68-2-1, ACLA 1949 as follows:

ACTIONS WITHIN JURISDICTION: JUDGMENT ON CONFESSION.

A justice's court has jurisdiction, but not exclusive, of the following actions:

First. For the recovery of money or damages only when the amount claimed does not exceed one thousand dollars;

Second. For the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed one thousand dollars;

Third. For the recovery of any penalty or forfeiture, whether given by statute or arising out of contract, not exceeding one thousand dollars;

Fourth. Also to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute.

The next Section, 68-2-2 provides:

ACTIONS NOT WITHIN JURISDICTION.

The jurisdiction conferred by the last section does not extend, however—

First. To an action in which the title to real property shall come in question;

Second. To an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction upon a promise to marry, in actions of an equitable nature, or in admiralty causes.

It is thus provided that equitable actions are specifically excluded from the jurisdiction of the Justice Court.

In Appellant's second claim for relief (TR p. 30) Appellant asks for reformation of the agreement, thus we see that not only was the equitable cause of reformation not pleaded in the cause filed in the Justice Court, but that had it been pleaded it could not have been heard nor passed on as not being within the jurisdiction of that Court. In Appellant's first claim for relief (TR p. 27) appellant seeks relief under the Declaratory Judgment Act. It is urged that the Justice Court also had no jurisdiction to try an action for declaratory judgment. In the District Court's minute order dismissing the complaint in Cause No. 13,503 the Court said, (TR p. 34) that the declaratory judgment act is procedural and does not create new rights upon a cause of action previously decided. Assuming for purposes of argument that this portion is correct, it is urged that the second claim for relief filed in Cause No. 13,503 in the complaint, raises the issue of whether or not the Appellant is entitled to reformation. It is urged that at least this claim for relief was not and could not have been decided in the Justice Court which lacked jurisdiction, and therefore the doctrine of *res judicata* is not applicable to this claim for relief.

ARGUMENT III.

THE COURT ERRED IN RULING THAT THE ISSUES DECIDED IN THE INITIAL ACTION FILED WERE CONCLUSIVELY DETERMINED AS BETWEEN THE PARTIES UNDER THE DOCTRINE OF RES JUDICATA.

The Court granted Appellant's motion to dismiss complaint in Cause No. 13,503 and ruled that the "Issues decided in initial action filed by a party are conclusively determined as between the parties under the doctrine of *res judicata* . . ." (TR p. 34). The ruling of the Court is unintelligible at best. The Court confuses the doctrine of collateral estoppel and *res judicata*. It remains however that the judgment of dismissal was signed and entered. As there are no findings or conclusions, the minute order must stand as the basis of the Court's ruling. It must be assumed then that the District Court ruled that the judgment in the Justice Court (TR p. 17) precluded the Appellant, City of Anchorage from litigating the claims for relief in the complaint filed in Cause No. 13,503 (TR p. 27). In this the Court was in error. To determine what issues were conclusively determined, or what cause of action was decided by the Court in the first instance which was the Justice Court, one must look at the pleadings. In the instant case the pleadings, as originally filed, are further limited and narrowed by a stipulation entered into by the parties (TR p. 12). It is worthy to note that in paragraph 6 of that stipulation (TR p. 13) we find the following language: ". . . the sole question to be decided herein is whether or not the word 'property' as used in said contract means real property or

whether it means real and personal property.” The judgment then rendered by the Justice in the Justice Court (TR p. 17) ruled that Appellant was not entitled to relief, and thus decided that the word property, contained in the agreement (TR p. 6) meant only real property and that therefore the Appellant was not entitled for the amount sued for which would have been due had the word property meant real and personal property.

It cannot be assumed that the Justice in entering this judgment would go beyond the stipulation in arriving at his decision. An appeal was taken from this judgment as indicated (TR p. 18). After this appeal was taken, the cause was then before the District Court. A trial in the District Court on an appeal from the Justice Court is a trial *de novo* (ACLA 1949, 68-9-10). Whether or not the stipulation would limit the District Court in determining the cause as appealed remains in question. However, at this point with or without the stipulation, it remains that the Justice Court only passed on the issues as framed by the pleadings and these pleadings were further limited by the stipulation. Although the defense of *res judicata* is not one specifically provided for by the Federal Rules as one of the defenses that can be raised on a motion to dismiss, here both proceedings being before the same Court and Judge, the fact that this defense was not pleaded, but raised in a motion to dismiss may be acceptable procedure. However, the defense of *res judicata* should generally be pleaded (*Cruz-Sanchez v. Robinson*, 136 F. Supp. 52). The pleading and proving of the defense of *res judicata*

is the better practice. Assuming that the stipulation filed by the parties to the original action in the Justice Court did not limit the issues that would be considered finally adjudicated unless changed on appeal to the District Court, it must be determined what was passed on by the Justice Court and thus precluded from being raised by the parties in the subsequent proceedings.

Judge Holmes has stated the principals involved in *res judicata* in the case of *Hyman v. Regenstein*, 222 F. 2d 545, page 549, "In order to make a matter *res judicata*, there must be a concurrence of four conditions, namely: 1. Identity in the thing sued for; 2. Identity of the cause of action; 3. Identity of persons and of parties to the action; 4. Identity of the quality in the persons for or against whom the claim is made." The Court went on to say later, "These are affirmative defenses that must meet the test required by the doctrine of *res judicata*." (Ibid.) In the instant case, the Court ruled without benefit of pleading or evidence. In examining the present record, it can be seen that only items 3 and 4 have been met. The persons and parties to the action are the same, and the identity of the quality of the persons is the same. However, the identity of the thing sued for and the identity of the cause of action are not the same. The Appellant-Plaintiff below, in the Justice Court, asked in his prayer for relief for the amount of \$400.00 in a money judgment based on the contract between it and the Appellee. The basis of Appellant's claim was the contract entered into by it and the Appellee wherein the Appellee agreed to pay

certain monies to the Appellant in lieu of taxes for sewer services to be rendered by the City of Anchorage. It was the Appellant's contention that such payment in lieu of taxes be equal to the total City levy including both real and personal property of the Appellee Alaska Dairy Products. Appellee in its answer (TR p. 10) admitted paragraphs 1 through 5 of Appellant's complaint, admitted that the assessed valuation of its personal property was \$46,000.00 but denied that it ever agreed to pay the City of Anchorage any amount because of personal property. Stipulations were made and evidence was heard by the Justice. The judgment was entered (TR p. 17) ruling that the City, Appellant here, had no money coming from Alaska Dairy Products and that the agreement entered into by the parties contemplated only a payment in lieu of taxes on the real property of the Appellee. This case was then appealed. In examining the complaint in Cause No. 13,503 (TR p. 27) as to the thing sued for, or the prayer for relief in that complaint, (TR p. 31) here Appellant asks that the Court reform the instrument according to the intent of the parties, further, that the Court declare certain rights and duties under the contract entered into by the party, but no allegation is made that the Court declare that the word property, as used in the contract, mean real and personal property as the Justice Court in the first case already decided that as used in the contract it meant only personal property. It is thus urged that Test No. 1, layed down by Judge Holmes, "Identity to the things sued for" has not been met. As to Point No. 2, "Identity of the cause

of action'', it is maintained that the cause of action is not the same either. It is urged that the cause of action originally filed in the Justice Court was a cause of action for money due and owing on a contract and involves an interpretation of that contract. The judgment was against the Appellant and the interpretation was in favor of the Appellee. In the complaint, which is the subject of this appeal, Appellant is asking that the Court reform the instrument according to the intent of the parties. The facts alleged which would necessarily have to be proven to entitle the Appellant to reformation are not the same facts that were proved to obtain the judgment in the original cause filed in the Justice Court. Appellant in this latter complaint also asks for a declaratory judgment. It is true that this could involve a redetermination of the meaning of the words as used by the parties in the contract. However, in examining the allegations in the pleading, it is obvious that different allegations are made and different facts would need to be proven in order to establish the claims made in the prayer for relief. It is therefore urged that the identity of the cause of action is not the same and the defense as urged by the Appellee of *res judicata* has failed to meet the second test laid down by Judge Holmes.

The principals involved in the defense *res judicata* are general in nature. Each case must be examined as to its own fact situation. It is urged here that different causes of action or claims for relief are pleaded in the second complaint. Support for the conclusions that where different causes for action were pleaded even though the parties were the same,

the defense of *res judicata* will not be sustained, can be found in *Speed Products Co. v. Tinnerman Products*, 222 F.2d 61. Under the defense of *res judicata*, a second suit is barred on the *same* (emphasis supplied) cause of action (*Lawler v. National Screen Services Company*, 75 S.Ct. 865, 349 U.S. 322, 99 L.Ed. 1122).

Equally applicable in the instant case, as in the *Tinnerman* case, *Speed Products Co. v. Tinnerman Products*, 222 F. 2d 61, is that certain matters that were actually litigated cannot be again litigated because of the defense of collateral estoppel. If the stipulation (TR p. 12) has any bearing, the only major issue actually litigated in the Justice Court was the meaning of the word "property" as used by the parties in the agreement (TR p. 6). Under the similar theory of collateral estoppel the issues actually litigated in the first action cannot be relitigated in the second suit (*Lawler v. National Screen Services Company*, 75 S.Ct. 865, 349 U.S. 322, 99 L.Ed. 1122; *Fairmount Aluminum v. Commission of Internal Revenue*, 222 F. 2d 622, cert. denied 76 S.Ct. 76, 350 U.S. 838, 100 L.Ed. 748, rehearing denied 76 S.Ct. 177, 350 U.S. 905, 100 L.Ed. 795, rehearing denied 77 S.Ct. 144, 362 U.S. 913, 1 L.Ed. 2d 120; *Parker v. Westover*, 221 F. 2d 603; *Providential Development Co. v. U. S. Steel Co.*, 236 F. 2d 277).

Query. How, on the basis of the record before the District Court, could the Court determine exactly what issues were passed on by the Justice Court? If certain issues have been finally adjudicated, the record on appeal is not conclusive as to which exactly they

are. Yet the District Court has said in effect, the Appellant has stated no claim for relief and has dismissed Appellants action. The Court has dismissed an action presumably based on the doctrine of *res judicata*, but talks in the minute order in terms of collateral estoppel. There certainly isn't enough in the record to sustain dismissing Appellant's action.

CONCLUSION.

1. Appellant has stated valid claims for relief which have not previously been decided by a Court of competent jurisdiction.

2. The Court erred in dismissing Appellant's action based on a ruling that issues decided in initial action filed by a party are conclusively determined as between the parties.

It is therefore urged that the judgment dismissing Appellant's action be reversed and Appellant prays that Appellee be required to answer the complaint.

Dated, Anchorage, Alaska,

February 27, 1958.

Respectfully submitted,

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No. 15,788

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLEE.

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No. 15,788

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

The District Court had jurisdiction over this matter by virtue of 48 U.S.C.A. 101. This court has jurisdiction over this Appeal by virtue of 28 U.S.C.A. Sections 1291 and 1294 (2).

STATEMENT OF THE CASE.

This litigation arose from a contract dated May 18, 1955, entered into by appellant and appellee (TR 6-8), the tenor of which is: That appellee could tie onto the sewer line of appellant and, in consideration for this service would pay appellant, in lieu of taxes, what

taxes on appellee's property would be if appellee were within the city limits of appellant. The word "property" was not defined in the contract. Proceeding under the contract, appellee installed the sewer at its own expense. Appellant did not. Appellant is in error, in its statement of the case, to the effect that the parties stipulated that the sewer line was installed by the City (TR 12; IV of Stipulation).

At assessment time and after the sewer line installed by appellee was put to use, appellant assessed appellee for real property taxes and also for personal property taxes. Appellant did and does contend that appellee is liable for both real and personal property taxes.

Appellee paid the real property taxes but did and does deny liability for personal property taxes.

A dispute having arisen as to liability for personal property taxes, appellant brought an action to enforce the contract, as interpreted by appellant, which was designated Civil Action No. 10-297-C in the Justice Court for the Anchorage Precinct of Alaska (TR 3-9). The substance of appellee's answer to the complaint in 10-297-C was to admit the complaint except to deny liability for personal property taxes (TR 10-11).

To expedite the trial of 10-297-C, appellant and appellee entered into a stipulation (TR 12-17), the substance of which was that the sole question to be determined was whether or not "property" as used in paragraph III of the agreement of May 18, 1955, means real property alone or real and personal property.

At the trial of 10-297-C, the Justice Court considered not only this stipulation of appellant and appellee; but it also heard oral testimony of George C. Shannon and B. W. Boeke, the city manager and clerk, respectively, of appellant, and George D. Jackson, president of appellee, as to the intent of the parties at the time of entering the agreement of May 18, 1955. It was impossible to get this testimony into this record on appeal, because the Justice Court is not a court of record; however, in order that this court might be fully informed, counsel for appellant and appellee have stipulated that this court may consider the fact that, in 10-297-C, George C. Shannon and B. W. Boeke testified that the intent of the parties was that "property" meant real and personal property and George D. Jackson testified that, the intent of the parties was that "property" meant real property alone.

Thus arose the first question, namely: Is appellee responsible to pay appellant an amount equal to real property taxes alone or an amount equal to real and personal property taxes?

From Judgment entered in favor of appellee in 10-297-C, appellant appealed to the District Court in Anchorage, and that appeal is still pending; therefore, the final determination of the above question is yet to come.

Being appealed to the District Court, 10-297-C was redesignated Civil Action No. A-13,001 in the District Court.

In A-13,001, appellant then sought to amend its complaint so as to seek additional forms of relief, namely, reformation of the contract of May 18, 1955, to the effect that "property" means real and personal property and a declaratory judgment enabling appellant to avoid the contract (TR 19-26).

The second question then arose, namely: Can, under the laws of this Territory, such new and additional forms of relief be sought for the first time after appeal from a justice court?

The District Court said, "No;" and denied the amendment (TR 26).

It is noteworthy that the Order denying the amended complaint was entered June 14, 1957 (TR 26); whereas, notice of this appeal was not given until October 7, 1957. Such illustrating the period of time over which appellant has vexed appellee through litigation.

Having been denied the right to amend, appellant thereafter initiated in the District Court in Anchorage, Civil Action No. A-13,503 (TR 27-32), in which appellant sought essentially the same relief as it sought in its attempted amendment in A-13,001, namely: A reformation of the contract of May 18, 1955, to the effect that "property" means real and personal property instead of real property alone, and a declaratory judgment to the effect that appellant was not bound by said contract of May 18, 1955.

Appellee's motion to dismiss the complaint in A-13,503, although contested by appellant, was successful and resulted in a judgment of dismissal with preju-

dice, September 12, 1957, from which this appeal is taken (TR 32-35). (The Judgment of September 12, 1957, was erroneously labeled "Motion and Judgment of Dismissal with Prejudice").

The entry of this judgment of dismissal in A-13,503 gives rise to the questions to be determined on this appeal, the primary question being whether or not the judgment below should be affirmed, namely:

1. Should a judgment be reversed because the stated reason for its entry is erroneous?

2. As a matter of the policy favoring the expeditious determination of disputes between a single plaintiff and a single defendant, should the judgment below be affirmed?

3. Does the pendency of A-13,001 bar appellant from the reformation relief sought in A-13,503?

4. Is appellant estopped from maintaining A-13,503?

5. Has appellant waived its right to maintain A-13,503?

6. Are there multiple causes of action here or but a single cause of action and multiple remedies?

7. Does the doctrine of election of remedies bar appellant from maintaining A-13,503?

8. What acts constitute a conclusive election under the doctrine of election of remedies?

9. Do the Federal Rules of Civil Procedure bar appellant from maintaining A-13,503?

10. Is appellant barred from maintaining A-13,503 by virtue of the doctrine of *res judicata*?

ARGUMENT.

SHOULD A JUDGMENT BE REVERSED BECAUSE THE STATED REASON FOR ITS ENTRY IS ERRONEOUS?

With respect to appellant's argument I, appellee is confused as to the results sought to be obtained by appellant.

The prayer in appellant's brief (Appellant's Brief p. 16) does not request a reversal of the ruling of the District Court on the motion of appellant to amend its Complaint in A-13,001; and appellant's argument No. I seems directed to the necessity of including items 4 and 5 of its designation of record (Motion for Leave to File Amended Complaint and Amended Complaint Accompanying Motion, plus Minute Order Denying Leave to File Amended Complaint) in order that this court might have the background and information necessary to determine this appeal. Appellee has no objection whatever to this court's considering items 4 and 5 in determining this appeal. However, in appellant's first statement of points relied on (TR 37) and his first specification of error (Appellant's Brief p. 4) and the title to his first argument (Appellant's Brief p. 5) appellant indicates that it desires this court to rule on whether or not the District Court erred in refusing appellant permission to amend its complaint in A-13,001. Appellee submits that such question is not, however, before this court for determination because of the reasons stated in appellee's

objection to appellant's designation of record on appeal and supporting memorandum (TR 43-45).

Appellee interprets appellant's brief, all three of the arguments contained therein, as being to the effect that the judgment appealed from should be upset because of the reason stated by the District Court for entering the judgment, to-wit, *res judicata*. If this interpretation is correct, appellee cannot see how the brief of appellant can be of any aid to this court. The reason stated by the District Court for entering the judgment appealed from is immaterial. The important point is whether or not the judgment appealed from is correct, irrespective of the reasons stated by the district judge for entering the judgment he did, whether the reason be stated in a minute order (TR 34) or otherwise (TR 36).

"In the review of judicial proceedings the rule is settled, that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208; *U.S. v. American Railway Express Co.*, 265 U.S. 425; *U.S. v. Holt State Bank*, 270 U.S. 49, 56; *Langnes v. Green*, 282 U.S. 351; *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239; cf. *U.S. v. Williams*, 278 U.S. 255 . . ."

Helvering v. Gowran, 302 U.S. 238 at 245.

"In that connection, the reasons given therefor by the court, whether right or wrong, are unimportant because: 'A judgment will not be reversed merely because the court gave a wrong reason for the rendition thereof.' *Kelley v. Wehn*,

63 Neb. 410; 88 N.W. 682. . . . As held in *Kanally v. Bronson*, 97 Neb. 322, 149 N.W. 781: 'A proper judgment under the pleadings and the evidence will not be reversed on appeal merely because the trial court did not give the right reason for the decision' . . ."

Sopcich v. Tangeman, 45 N.W. 2d 478 at 481.

"it (the opinion) cannot prevail against the final order or decision . . . The presumption exists that all the facts in a record bearing upon the points decided have received full consideration by the court, whether all, a part, or none of these facts are mentioned in the opinion. . . ." (Parentheses ours.)

21 *C.J.S.* 414, Courts, Section 222(b).

For further authority on this same point, see: 49 *C.J.S.* 51-52, Judgments, Sec. 22; *Kipp v. Clinger*, 106 N.W. 108; *First National Bank in Wichita v. Luther*, 217 Fed. 2d 262 at 266; *People ex rel Holzapple v. Ragen*, 117 N.E. 2d 390 at 393, Certiorari denied 347 U.S. 963; *Brown v. Allen*, 344 U.S. 443 at 459; 30 *Am. Jur.* 169, Judgments, Sec. 15; 3 *Am. Jur.* 563, Appeal and Error, Sec. 1008; innumerable cases in Volume 2 *Sixth Decennial Digest*, 478-483, Key number: Appeal and Error 854 (2).

AS A MATTER OF THE POLICY FAVORING THE EXPEDITIOUS DETERMINATION OF DISPUTES BETWEEN A SINGLE PLAINTIFF AND A SINGLE DEFENDANT, SHOULD THE JUDGMENT BELOW BE AFFIRMED?

Appellant's trail through the courts in connection with the matters involved in this appeal is a long and

devious one. Appellant began a suit to enforce the contract of May 18, 1955, in the Justice Court. Losing, appellant appealed to the District Court (A-13,001); and that action is still pending there. Appellant then sought to inject into A-13,001 additional claims for relief in the nature of reformation and declaratory judgment. Having failed in this attempt, appellant brought a separate action (A-13,503) in the same District Court seeking the identical relief of reformation and a declaratory judgment. The subsequent action (A-13,503) having been dismissed, appellant now appeals to this court. Part of the relief requested by appellant on this appeal is the reinstatement of A-13,503 with respect to reformation; however, appellant's prayer in connection with reformation in A-13,503 is that it may have judgment "1. That by decree of this court, the above mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties. . . ." (TR 31). As appellant points out in its brief, such is all it asks in connection with reformation, namely: "That the court reform the instrument according to the intent of the parties, . . ." (Appellant's Brief, p. 13). Appellant does not seek to reform the contract *and* enforce the contract as reformed. This prayer for reformation illustrates more vividly than any other act of appellant the condemnable conduct of appellant in submitting appellee to continuous litigation. Under its prayer, apparently, appellant would like to get the contract reformed and a judgment to that effect. It appears that, armed with this judgment, appellant would then like to bring still an additional law suit to enforce the contract in accordance with the judgment previously obtained.

Appellant's conduct throughout these proceedings can in no way be justified in the light of the liberal joinder and pleadings rules of the Federal Rules of Civil Procedure; and its conduct conclusively establishes appellant's contempt for, and disregard of, every legal principle involved in the doctrines of *res judicata*, election of remedy, estoppel, waiver, circuitous actions, multiplicity of suits, and any other doctrine seeking to expeditiously dispose of controversial matters arising out of a single transaction at a single time.

"The procedural rules are designed to eliminate multiplicity of suits and to dispose of all claims between the parties on one proceeding."

Vahle v. Markham, 5 F.R.D. 315 at 317.

"State practice to the contrary notwithstanding, the present federal procedure contemplates the disposition at one time of all rights and liabilities arising out of a single event, so far as disposition may be possible and practical."

Sinkbiel v. Handler, 7 F.R.D. 92 at 97.

"Public policy demands that a multiplicity of suits be not maintained even by a party entitled to maintain them when one suit would suffice. . . ."

Cold Metal Process Company v. United Engineering & Foundry Company, 190 Fed. 2d 217 at 222.

The application of this policy against multiple suits or continuous vexing of the defendant in court is particularly applicable in this case for two reasons:

1. In the case at bar we have a factual situation where appellant could, at the time it brought its suit in the Justice Court, have sued in the District Court, not only to enforce the contract but to reform the contract and enforce it as reformed and also for a declaratory judgment. Appellee feels that it is of primary significance that these three rights to relief were coexisting and that they arose out of a single transaction.

(a) As a matter of fact, if these demands of appellant had arisen below by way of counterclaim and not complaint, joinder would have been compulsory.

“A pleading shall state as a counterclaim any claim which at a time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence and is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.” (Rule 13 (a), F.R.C.P.)

It is noteworthy that the language of Rule 13 (a) is in terms of “claims” and not in terms of causes of action.

2. Affirming the judgment below, will in no way injure appellant. A-13,001 remains pending, and appellant may there have determined in full its rights under the contract of May 18, 1955 that

it made with appellee. No doubt appellant will contest this statement on the grounds that, while A-13,001, will determine the amount of money due appellant from appellee, nevertheless, this contract of May 18, 1955, is a burden on appellant; and appellant is entitled to a decision as to whether or not the contract can be avoided. In the first place, such a contention is immaterial. If the contract is valid and binding, it makes no difference whether or not appellant considers it a desirable contract. Although the question of avoidance is not before this court, appellee submits that this record reflects on its face the fact that appellant, obviously, cannot successfully maintain a suit to avoid the contract of May 18, 1955, in view of the fact that it has, for several years, accepted the monetary benefits of the contract. Further, the contract was drawn by appellant and is to be construed, therefore, against appellant. Appellant would be estopped.

The granting of a declaratory judgment is discretionary and should be refused if there is nothing to be gained by it (*Maryland Casualty Co. v. Consumers Finance Service of Pa.*, 101 Fed. 2d 514; *Libberman v. Merkin*, 2 F.R.D. 315). Appellee will dwell in detail, subsequently in this brief, on the contention that the reformation relief sought in A-13,503 is identical to the relief of enforcing the contract in A-13,001; except that it appears appellant intends to obtain it by initiating still another law suit (p. 9 ante).

If, therefore, appellant cannot avoid its contract, to permit an action for a declaratory judgment would be futile; and, if appellant can obtain all the relief in A-13,001 that it seeks by reformation in A-13,503, the determination of this appeal against appellant can in no way work a detriment to appellant.

DOES THE PENDENCY OF A-13,001 BAR APPELLANT FROM THE REFORMATION RELIEF SOUGHT IN A-13,503?

Although it is, admittedly, at the discretion of the court, where two identical actions are pending, whether or not one will be dismissed or merely stayed while the other is completed, appellant submits that the better policy, where there are identical parties, subject matter and relief sought, is to dismiss the subsequent action. As will be spelled out herein, the reformation sought in A-13,503, is identical to the relief sought in A-13,001. The parties and the subject matter are the same. A-13,001 is pending. A-13,503 has been dismissed; therefore, at least with respect to reformation, this court should affirm the judgment below in A-13,503 (1 *C.J.S.* 61, Abatement and Revival, Secs. 36 and 37; 1 *C.J.S.* 119, Abatement and Revival, Sec. 81; *Wheelis v. Wheelis*, 226 S.W. 2d 224; *Sears, Roebuck and Company v. Metropolitan Engravers*, 245 Fed. 2d 67).

IS APPELLANT ESTOPPED FROM MAINTAINING A-13,503?

The doctrine of election of remedies will be discussed subsequently. Some courts will not recognize this doctrine but, instead, rely upon the doctrine of

estoppel. The majority of courts distinguish between the two doctrines. When considering the doctrine of estoppel, the courts require a showing that failure to require a party to abide by the remedy elected will cause a real injury to the other party (28 *C.J.S.* 1059).

Appellee submits that it should prevail on this appeal under either the doctrine of election of remedies or that of estoppel.

In connection with estoppel, the primary point is that appellee had a right to rely upon the stipulation entered into by appellant and appellee to the effect "that . . . the sole question to be determined herein is whether or not the word 'property' as used in said contract means real property or whether it means real and personal property" (TR 13; paragraph VI of Stipulation). In the light of this stipulation, appellee had a right to believe that the judgment in the Justice Court would conclude this matter. It was appellant that chose the Justice Court. Certainly, appellee had the right to believe and reasonably rely upon the matter not proceeding beyond an appeal from the Justice Court to the District Court, the now pending action of A-13,001.

Instead of abiding by its stipulation, and by way of further injury to appellee, appellant submits appellee to the continued annoyance and expense of continuous and even duplicitous legal proceedings: first, in opposing the amendment to the complaint in A-13,001 (unjustifiable in the light of the above quoted stipulation and in the further light of the fact that ap-

pellant must be presumed to know the law) (Sec. 68-9-14, *A.C.L.A.* 1949; TR 6-7) and therefore knew it had no chance of success in seeking the amendment; and, second, the annoyance, expense and inconvenience throughout all the proceedings in A-13,503, including this appeal.

The above stated applies to both the remedies of reformation and declaratory judgment.

HAS APPELLANT WAIVED ITS RIGHT TO MAINTAIN A-13,503?

Appellee submits that the stipulation just quoted in connection with estoppel (TR 13) is an excellent basis for a decision that appellant has waived its right to maintain A-13,503.

“Section 68-2-1. Actions within Jurisdictions: Judgments on Confession.

A justice's court has jurisdiction, but not *exclusive*, of the following actions:

First. For the recovery of money or damages only when the amount claimed does not exceed \$1000.00; . . .” (Emphasis ours.)

Sec. 68-2-1, *A.C.L.A.* 1949.

“Where a counterclaim exceeding the jurisdictional limit is pleaded, the jurisdiction of the justice's court is not ousted, but the prevailing defendant cannot, besides defeating plaintiff's claim, be awarded more than jurisdictional amounts; he waives any balance.”

Notes of Decisions 3 *A.C.L.A.* 2454;

Bennett v. Forrest, 69 F. 421, 1 Alaska Rep. 721-722.

By a like token, where appellant had available to it, equitable and statutory remedies (reformation and declaratory judgment) over which only the District Court had jurisdiction, and particularly when these remedies arose out of the same transaction and existed concurrently with the remedy of enforcing the contract, by initiating action in a Justice Court for less than appellant claimed to be entitled, it waived the overage.

ARE THERE MULTIPLE CAUSES OF ACTION HERE OR BUT A SINGLE CAUSE OF ACTION AND MULTIPLE REMEDIES?

There seems to be some confusion as to whether or not the differences between appellant and appellee are concerned with multiple causes of action or merely multiple remedies (Appellant's Brief p. 12).

It may be contended that there are two causes of action, one to enforce the contract, which embodies not only the remedy of reformation, but the remedy of enforcement, and a second cause of action for a declaratory judgment; however, appellee believes that the law establishes that the procedure for a declaratory judgment is not a cause of action but merely a procedural remedy. Indeed, the cases hold that a proceeding for a declaratory judgment will lie irrespective of the existence of a cause of action (*Maryland Casualty Company v. Hubbard*, 22 Fed. Sup. 697).

The present declaratory judgment statute, (28 U.S.C.A. Sec. 2201) is a descendant from the old Section 400 of the same Title which reads:

“In cases of actual controversy, except with respect to federal taxes, the courts of the United

States shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights and other legal remedies of any interested party petitioning for such declaration, whether or not such further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such." (48 Stat. 955; 49 Stat. 1027.)

The present Federal Declaratory Judgment Statute (28 U.S.C.A. Sec. 2201) is, and since the passing of the old Sec. 400, has been held to be, a procedural statute which provides an additional remedy for use in those controversies over which District Courts already have jurisdiction (*American Chemical Paint Co. v. Dow Chemical Co.*, 161 Fed. 2d 956, rehearing denied, 164 Fed. 2d 208; *Caven v. Clark*, 78 Fed. Sup. 295; *Sachs v. Cluett, Peabody & Company*, 91 Fed. Sup. 37; *Berlitz School of Languages of America v. Donnelley and Suess*, 84 Fed. Sup. 75; *Donnelley v. Mavar Shrimp and Oyster Co.*, 190 Fed. 2d 409 at 410).

The act is to determine rights prior to the filing of a regular action and to prevent multiplicity of litigation (*Security Insurance Co. v. Jay*, 109 Fed. Sup. 87; *Scott-Burr Stores Corp. v. Wilcox*, 194 Fed. 2d 989).

The declaratory judgment statute merely enlarges the range of remedies (*Pa. Railway Co. v. U.S.*, 111 Fed. Sup. 80).

Speaking of the various declaratory judgment acts, it is said:

"... that the effect is simply to make a controversy over a legal or equitable right or title jus-

ticipable at an earlier state of the controversy than that which gave rise to a cause of action at common law, or to enable the normal defendant to institute the proceedings.

In general, it may be said that declaratory judgment acts are designed to supply former deficiencies in legal procedure and to furnish a full and adequate remedy where none existed before, rather than to supplant or displace pre-existing and effective remedies or to provide a substitute for other regular actions. . . .”

16 *Am. Jur.* 281, Declaratory Judgments, Sec. 7.

“Jurisdiction under a declaratory judgment act is not confined to cases in which the parties or one of them have a cause of action apart from that conferred from the act itself. . . . To hold that there must be a ‘cause of action’ as that term is ordinarily used would defeat the fundamental purpose and destroy the real value of the *remedy*.” (Emphasis ours.)

16 *Am. Jur.* 286, Declaratory Judgments, Sec. 12.

From the date of the initial enactment of the Federal Declaratory Judgment Statute (Old Sec. 400, *supra*) to the present Section 2201, the cases have uniformly held that a declaratory judgment is procedural and remedial and, hence, not a cause of action at all. (*Reliance Life Ins. Co. v. Burgess*, 112 Fed. 2d 234; *Love v. U.S.*, 108 Fed. 2d 43; *Ohio Casualty Ins. Co. v. Marr*, 98 Fed. 2d 973; *Ohio Casualty Ins. Co. v. Richards*, 27 Fed. Sup. 18; *Sinclair Refining v. Burroughs*, 133 Fed. 2d 536).

Some of the cases contain even stronger language to the effect that a declaratory judgment has nothing to do with the creation of a right, a thing to be protected by a cause of action and continue that the declaratory judgment merely establishes a new remedy for existing rights (*Aralac, Inc. v. Hat Corp. of America*, 166 Fed. 2d 286; *American Chemical Paint Co. v. Dow Chemical Co.*, *supra*; *Davis v. American Foundry Equipment Co.*, 94 Fed. 2d 441; *American Casualty Co. of Reading, Pa. v. Howard*, 80 Fed. Sup. 983; *Sunshine Mining Co. v. Carver*, 34 Fed. Sup. 274).

**DOES THE DOCTRINE OF ELECTION OF REMEDIES BAR
APPELLANT FROM MAINTAINING A-13,503?**

The doctrine of election of remedies is a rule of policy designed to prevent vexatious litigation (28 *C.J.S.* 1058, Election of Remedies, Sec. 1).

The basis of the rule is that one shall not be vexed twice for one and the same cause (28 *C.J.S.* 1060).

Stated differently, the rule is based upon prohibiting one from occupying inconsistent positions; in other words, one shall not be allowed to both approbate and reprobate (28 *C.J.S.* 1058).

The doctrine is recognized by both state and federal courts (28 *C.J.S.* 1058, *supra*; *U.S. v. Oregon Lumber Co.*, 260 U.S. 290; *Durham v. New Amsterdam Casualty Co.*, 208 Fed. 2d 342; *U.S. v. Bernstein*, 149 Fed. Sup. 568; *First Nat'l Bank in Wichita v. Luther*, *supra*; *Sears, Roebuck and Co. v. Metropolitan Engravers*, *supra*).

“All actions which proceed on the theory that plaintiff has ratified an authorized transaction are inconsistent with actions which proceed on the theory that plaintiff has repudiated such transaction.”

28 *C.J.S.* 1076, Election of Remedies, Sec. 9.

See also:

Minneapolis Nat'l Bank of Minneapolis, Kansas v. Liberty Nat'l Bank of Kansas City, 72 Fed. 2d 434;

Butler Bros. v. Hames, 97 S.W. 2d 622.

Rescission and reformation are inconsistent (*Feit v. Reichert*, 189 Pac. 854); hence, the relief of declaratory judgment asking that appellant be allowed to avoid the contract or to have the contract declared void is inconsistent with A-13,001 to collect money allegedly due under the contract, that is, to enforce the contract of May 18, 1955.

In *U.S. v. Oregon Lumber Co.*, *supra*, the court was concerned with an action brought by an appellant against appellee seeking damages for the fraudulent acquisition of land by patent from the government. The appeal to the Supreme Court was from the Ninth Circuit. Previously, appellant had lost the suit against the appellee which sought to set aside the patent and establish ownership of the land in appellant, the United States. The prior suit was lost by the United States as a result of a plea in bar of the statute of limitations. The court held for appellee and based its decision on the doctrine of election of remedies (*U.S. v. Oregon Lumber Co.*, 260 U.S. 290).

“Upon the facts stated the sale was voidable (*Moran v. Horsky*, 178 U.S. 205, 212), and the plaintiff in error was entitled to disaffirm the same and recover the land or affirm it and recover damages for the fraud. It could not do both. Both remedies were appropriate to the facts, but they were inconsistent since the first was founded upon a disaffirmance and the second upon an affirmance of a voidable transaction. *Robb v. Vos*, 155 U.S. 13, 43; *Connihan v. Thompson*, 111 Mass. 270, 272. 2 Black on Recision and Cancellation, Sec. 562, and cases cited. The rule is applicable to the government in cases where patents have been procured by fraud. *U.S. v. Kolenko*, 366 Fed. 180, 183. Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based on one or the other of these inconsistent conclusions. *Robb v. Vos*, *supra*.”

U.S. v. Oregon Lumber Co., *supra*, at 294-295.

“But here in the equity suit, the plaintiff in error upon the coming in of defendant’s plea of the statute of limitations made no offer to amend or request to transfer the case to the law docket, but proceeded to trial and judgment upon the original bill, with knowledge of all of the facts for more than six years prior to the filing of its bill. Defeated in its equity suit, it brought its action at law upon the same allegations of fact. We think it is not admissible to thus speculate upon the action of the court, and having met with an adverse

decision, to again vex the defendant with another inconsistent action upon the same facts.”

U.S. v. Oregon Lumber Co., supra, at 296.

“The case of *Bistline v. U.S.*, 299 Fed. 546, relied upon by the plaintiff in error, is not in conflict with this conclusion. That was an action by the government to recover damages for the fraudulent acquisition of certain public lands. A prior suit had been brought in equity to cancel the patent, but the defendant’s answer showed that the land had been conveyed to persons not made parties to the suit. The government therefore promptly dismissed its suit in equity and, on the same day, commenced the action at law for damages. If, in the instant case, a like course had been followed upon the coming in of defendant’s answer pleading the statute of limitations, the case just referred to would have been in point.”

U.S. v. Oregon Lumber Co., supra, at 297.

“The distinguishing feature of the instant case is that after the coming in of the answer, pleading the statute of limitations, and the plain warning thus conveyed of the danger of continuing the equity suit further, the plaintiff in error persisted in pursuing it to final judgment, instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. The doctrine of election of remedies and that of *res judicata* are not the same, but they have this in common, that each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause. The policy embodied in this

maxim we think requires us to hold that the plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and that it is now estopped from maintaining the present inconsistent action.”

U.S. v. Oregon Lumber Co., supra, at 301.

Proceeding under the belief that a declaratory judgment is merely an additional remedy, appellee submits that the doctrine of election of remedies is applicable to this appeal and that, therefore, an action for declaratory judgment to the effect that a contract is void, being inconsistent with a pending action to enforce the contract (A-13,001) is barred by virtue of the doctrine.

One cannot both affirm and disaffirm (12 *Sixth Decennial Digest* 872 *et seq.*, Election of Remedies Key No. 3 (2)).

As previously stated a man shall not be allowed to approbate and reprobate.

Appellee submits that there can be no question but that the remedy of declaratory judgment seeking to disaffirm the contract, being inconsistent with the remedy to enforce the contract (A-13,001 pending in the District Court and 10-297-C having been decided in the Justice's Court) is barred by the doctrine of election of remedies (see also 28 *C.J.S.* 1063, Election of Remedies, Sec. 3a).

There is more doubt as to whether or not the doctrine of election of remedies will bar the relief of

reformation; however, appellee submits that the question has already been decided favorably to appellee so far as this court is concerned.

The cases which hold that an action to enforce the contract is no bar to a subsequent action to reform it base their reasoning on the ground that there is nothing inconsistent in the remedies seeking enforcement and the remedies seeking to reform in that they both seek to affirm the contract. This reasoning evades the issue, and the conclusion of these cases is possible only because the courts have the word "affirm" as the focal point of their reasoning.

The more logical approach is that nothing could be more inconsistent than attempting to enforce something "as is" (A-13,001 and 10-297-C) and attempting to enforce something "as it is not" (reformation in A-13,503).

In any event, appellee contends that the cases holding that there is no inconsistency in suing to enforce a contract and subsequently suing to reform it are not in point. Appellant seeks to enforce the contract in A-13,001 and sought to enforce it in 10-297-C. In the matter on appeal (A-13,503) appellant seeks to reform the contract; *but appellant does not seek to enforce the contract as reformed* (TR 31; Appellant's Brief, p. 13). The cases holding no inconsistency are concerned with an action to not only reform but to enforce it as reformed.

"According to some decisions, where a mistake has been made in a contract, of such a nature and

under such circumstances as to give rise to the equitable right to have the contract reformed, the prosecution to judgment of an action at law for damages for breach of the contract is inconsistent with and a bar to, a subsequent suit for the reformation of the contract. Likewise, a pending suit on a contract as written precludes a party from subsequently seeking reformation thereof."

28 C.J.S. 1073, Election of Remedies, Sec. 7.

Einsiedler v. Massari supports this doctrine. Massari sued Einsiedler for the balance due on a contract. Einsiedler defended by affirmatively pleading a loan agreement and a security trust agreement, the operation of which was to pay the balance on the contract on which Massari based his claim. Massari won. Einsiedler brings the present action by way of reformation of the contract on which Massari recovered in order to incorporate into that contract the loan agreement and the security trust agreement previously pleaded by Einsiedler. The court refused and denied the action of reformation. The case is an excellent one in discussing the policy involved. (*Einsiedler v. Massari*, 78 Atl. 2d 572).

It is true that the court in the *Massari* case said that it bases its decision on *res judicata*; however, as a matter of fact, *res judicata* cannot apply except upon the principle that a matter is *res judicata* as to not only what was decided but as to all that could have been decided between the parties. The policy on which the court based its decision is applicable to the present case now on appeal before this court; and that

policy is to the effect that, there being liberal rules of joinder in pleading and the abolition of the distinction between courts of law and courts of equity, Einsiedler had an opportunity not only to plead the loan agreement and security trust agreement by way of an affirmative defense in the original suit brought by Massari, but, at that time, he had an opportunity to seek the reformation he now seeks in the subsequent action.

As previously pointed out, the *Massari* case supports the contention that appellant's conduct is particularly unjustifiable in light of the fact that, at the time appellant instigated action in the Justice's Court, it had a choice of forums between the Justice Court and the District Court; and there were coexisting at that time, the remedies to enforce the contract, to reform the contract and enforce it as reformed, and for a declaratory judgment. Instead of seeking these three claims for relief in the District Court at that time, appellant chose to prosecute this suit in a piecemeal fashion and even now threatens to throw other pieces at appellee in the future, since appellant still does not ask for enforcement of the contract as reformed (TR 31).

One who elects to sue upon a written contract as executed and who prosecutes the action to trial and judgment cannot thereafter bring an action to reform the contract (*Hennepin Paper Co. v. Fort Wayne Corrugated Paper Co.*, 153 Fed. 2d 822).

The *Hennepin* case involves a plaintiff who sued on a contract, as orally modified, which provided that de-

defendant was to purchase from plaintiff specified amounts of paper. Plaintiff lost. Plaintiff then brought the present action wherein "the plaintiff is seeking a reformation of the written contract under date of July 1, 1941, so as to make that contract conform to the 'true intent and understanding of both parties' to the contract. . . ." (*Hennepin* case, *supra* at 824). This case is directly in point, although the factual situation in the matter on appeal before this court is such as to spell out an even stronger case for this appellee than the defendant had in the *Hennepin* case. (As will be pointed out in a subsequent section as to what constitutes a conclusive election under the doctrine of election of remedies, appellant has not only elected the remedy but tenaciously refuses to relinquish it.)

"Under the Federal Rules of Civil Procedure, and under the law of Indiana, the plaintiff had the right, in the first action, to, by proper pleading, ask that the written contract of July 1, 1941, be reformed and redrawn, as it is attempting to do in the second action." (Emphasis ours.)

Hennepin case, *supra*, at 825.

By like token, this appellant had all three remedies available to it and the forum of the District Court open to it at the time it initiated the action to enforce the contract in the Justice Court, which action is now pending in the District Court at Anchorage as A-13,001.

"It certainly knew the same facts at the time the district court struck out paragraph V of the complaint in the first cause of action, as it knew at the

time it drafted the complaint in the second action, and it should have filed either an amended complaint or an additional count or paragraph in that action so as to have presented all issues in the same action.”

Hennepin case, *supra*, at 825.

By like token, when this appellant filed in the Justice Court, all facts concerned with the alleged right to all three remedies were known to this appellant. The appellant sued to enforce the contract, so its claim to recover money under the contract, obviously, was in the mind of appellant. It knew that there was a question of reformation, because it stipulated that the sole question to be decided in the Justice Court was the meaning of the word “property”. Further, it even had its city manager and clerk testify as to the intent of the parties, testimony relevant to nothing more than reformation. Certainly the existence of the Federal Declaratory Judgment Statute was a matter known to the city attorney at the same time. It was only after the appellant lost this action in the Justice Court that it became revengeful and attempted to avoid the contract by seeking amendment in A-13,001 and later initiating A-13,503. By proceeding in the Justice Court, initially, when it knew the Justice Court had no jurisdiction over reformation or declaratory judgment, it is obvious that the only thing appellant sought was money; but, being denied the money, it has undertaken to penalize appellee as much as it possibly can, threatening avoidance and the cutting off of the sewer service and continual, vexatious litigation.

“This it could have done ‘regardless of consistency and whether based on legal or equitable grounds or both.’ Rule 8 (c) (2) Federal Rules of Civil Procedure. The authority to thus have joined its claims is specifically provided for in Rule 18, of the Federal Rules of Civil Procedure as follows: ‘(a) Joinder of Claims. The plaintiff in his complaint * * * may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.’ See also, Burns’ Indiana Statutes, Annotated, 1933, Sec. 2-101, which reads as follows: ‘One form of action.—There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. All courts which are vested with jurisdiction both in law and equity may, to the full extent of their respective jurisdictions, administer legal and equitable remedies, in favor of either party, in one and the same suit, so that the legal and equitable rights of the parties may be enforced and protected in one (1) action.’ . . .

“Therefore, it seems clear that the plaintiff predicated his first suit on the written contract plus the alleged subsequent oral modification of one of its terms. . . . It made its election in the first action and it cannot now, in a separate action, assume an entirely different and inconsistent position in an effort to have the same written contract reformed. As heretofore observed, such effort, if it desired a reformation of contract, should have been undertaken in the first action. . . .

“The Supreme Court of Indiana in the case of Royal Ins. Co. v. Stewart, 190 Ind. 444; 129 NE 853, 857, said ‘Where a party elects to sue on a written contract as executed, and the action proceeds to trial and judgment, he cannot thereafter bring an action to reform the contract. 2 Black on Judgments, Sec. 632 * * *. Again, in the case of Knight v. Electric Household Utilities Corp., 133 N.J. Eq. 87, 30 Atl. 2d 585, 588, affirmed 134 N.J. Eq. 542, 36 Atl. 2d 201, the Court said, ‘Whether a plaintiff is precluded by the judgment, depends upon the extent to which the legal and equitable remedies have been merged in the state where the judgment is rendered. Restatement—Judgments, Sec. 66. The judgment barred the suit for reformation if the plaintiff could have obtained reformation in his original action on the contract. Royal Ins. Co. v. Stewart, Inc. 190 Ind. 444, 129 N.E. 853. But where the law court cannot give equitable relief, the judgment is not a bar. Northern Assurance Co. v. Grand View Bldg. Assoc., 203 U.S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109. . . .’

“Not only under the Federal Rules of Civil Procedure, but under the law of Indiana, the plaintiff could have, in the first action, sought a reformation of the contract, and *it was its duty* to have done so if it desired to litigate that question. Not having done so, and having sought an entirely different and inconsistent remedy in that action, it cannot now maintain the second action. The district court properly granted the motion of defendant for a summary judgment.

“The judgment of the district court is affirmed.”
(Emphasis ours.)

Hennepin case, supra at 825-827.

What better authority for the application of the doctrine of election of remedies or of estoppel or of an outright waiver, irrespective of appellee's right to rely upon the stipulation of appellant to the effect that the sole question is the definition of the word "property", could one have than the foregoing authority? (Supporting the *Hennepin* case, see: 49 A.L.R. 1513 at 1515-1517; *Leaksville Light & Power Co. v. Ga. Casualty Co.*, 137 S.E. 817.)

WHAT ACTS CONSTITUTE A CONCLUSIVE ELECTION UNDER THE DOCTRINE OF ELECTION OF REMEDIES?

As to what constitutes an act sufficiently decisive to prompt a court to hold, with respect to the doctrine of election of remedies, that an election has, in fact, been made, there is a wide divergence of authority.

"The authorities are by no means harmonious as to what acts constitute a conclusive election. . . . it may be stated as a general rule that any decisive act of a party, with the knowledge of his rights and of the facts, indicating an intent to pursue one remedy rather than the other, determines his election in case of conflicting and inconsistent remedies. . . .

"Any unambiguous act consistent with one remedy and inconsistent with others will generally be deemed conclusive evidence of an election. . . .

"According to some decisions, an election has matured only when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other. According to other authority, a deliberate choice or election is

binding even though no positive disadvantage or injury has resulted to the other party, and, as appears *infra* Sec. 15, the mere commencement of an action may be sufficient to preclude the subsequent pursuit of another remedy.”

28 *C.J.S.* 1077 to 1079, Election of Remedies, Sec. 11.

Some cases hold that a party is not bound by his election unless he obtains some advantage by his first action, such as judgment in his favor (*Morlan v. Lucey Mfg. Corp.*, 7 Fed. 2d 494, affirmed 14 Fed. 2d 920, certiorari denied 273 U.S. 744, 47 S.Ct. 344, 71 L.Ed. 870).

As noted in the above citation, the Supreme Court of the United States denied certiorari; however, when the matter was actually considered by the Supreme Court, it had this to say:

“ ; . . . and to hold that plaintiff may then invoke another and inconsistent remedy is not to recognize an exception to the general operation of the doctrine of election of remedies but to deny the doctrine altogether. Here, upon the facts as stated in the bill in equity and later in the action at law, both remedies were available to the plaintiff in error. In electing to sue in equity plaintiff in error proceeded with full knowledge of the facts, but it underestimated the strength of its cause, and if that were sufficient to warrant the bringing of a second and inconsistent action the result would be to confine the defense of an election of remedies to cases where the first suit had been won by plaintiff and to deny it in all cases where plaintiff had lost. But the election was

determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court. See, for example, *Bolton Mines Co. v. Stokes*, 82 Md. 50, 59.”

U. S. v. Oregon Lumber Co., *supra*, at 301.

The *Oregon Lumber* case is still good law.

There is an extensive annotation on this subject of what constitutes a conclusive election in 6 *A.L.R.* 2d 10.

Irrespective of the divergence of authority, there seems to be no doubt that the prosecution of one remedial right to judgment or decree, whether the judgment or decree is for or against the plaintiff, is a decisive act which constitutes a conclusive election, and that is exactly what appellant, as plaintiff, did in 10-297-C (28 *C.J.S.* 1087, Election of Remedies, Sec. 14).

“... it is uniformly held that prosecution of a remedy to a judgment on the merits is a conclusive choice precluding the plaintiff from thereafter maintaining an inconsistent remedy, and this rule has been held applicable even though the judgment was against the plaintiff . . .”

6 *A.L.R.* 2d 11.

The Federal courts have extended the doctrine well beyond the requirement of pursuing a remedy to judgment.

Some even prohibit the amendment of a complaint in such a way as to set forth, by amendment, a remedy inconsistent with that sought in the original com-

plaint (*U.S. v. Bernstein, supra; Warner v. Godfrey*, 186 U.S. 365).

In *Durham v. New Amsterdam Casualty Co.*, it was held that the obtaining of a motion to set aside a judgment on grounds that the judgment was obtained by fraud, *without any further proceedings* in that action whatsoever, constituted a bar to a proceeding in a separate action where damages for the fraud were sought. The court held that the obtaining of the order, setting aside the judgment as having been obtained by fraud, constituted an election to ignore the fraud and proceed on the merits; and that, therefore, the right to damages by fraud was lost (*Durham v. New Amsterdam Cas. Co., supra*).

To appellee's thoughts, the most reasonable and logical position is that stated in the *Oregon Lumber Co.* case, namely:

"... *Any decisive action by a party*, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions. *Robb v. Vos, supra.*" (Emphasis ours.)

U. S. v. Oregon Lumber Co., supra, at 295.

Appellee does not see how anyone could act more decisively toward electing a remedy than appellant has acted. Appellant has proceeded even beyond the obtaining of a judgment in the Justice Court. It has appealed that judgment to the District Court, and

that action is still pending. As a matter of fact, the reformation relief that appellant seeks is, in fact, no more than an added attempt to get a favorable judgment in A-13,001. The reformation sought is to spell out the word "Property" as meaning real and personal property. This is the sole issue in A-13,001 and the identical issue decided over a year ago January 2, 1957, (TR 18) by the Justice Court in 10-297-C. As stated, presumably, if appellant were successful in obtaining the reformation, appellant would then harass appellee even further by suing on the contract as reformed; otherwise, why reform it?

The issues in the Justice Court resolved themselves into this. If the Justice Court held for appellant and awarded it a monetary judgment, such could have been done only by deciding that "property" meant real and personal property. If the Justice Court held as it did, for appellee, such could be done only by holding that the word "property" meant real property alone. Since the matter is now appealed to the District Court as A-13,001, the District Court is now asked to interpret the meaning of the word property all over again. Appellant is seeking a further determination of the meaning of the word property in asking for reformation in A-13,001. In other words, appellant absolutely refuses to do anything other than attempt to enforce the contract *as interpreted by appellant*. Appellee cannot conceive of evidence more conclusive of an absolute election (see annotation in 6 *A.L.R.* 2d, particularly at pages 17, 18, 19, 25, 26, 27, 28, 29, 30 and 49).

**DO THE FEDERAL RULES OF CIVIL PROCEDURE BAR
APPELLANT FROM MAINTAINING A-13,503?**

If we are concerned here with but a single cause of action and three remedies, as appellee believes the facts to be, there is no question of joinder of causes of action, and it is to causes of action that Rule 18 of the Federal Rules of Civil Procedure is primarily directed although that rule speaks in terms of "claims" and not causes of action.

Appellee submits that it goes without saying that (1) seeking monies under a contract and (2) seeking reformation of a contract together with monies under it as reformed are but two remedies arising out of a single cause of action. Although appellant believes not, it is conceivable that a declaratory judgment could be held to be a separate cause of action and not merely a remedy arising out of the same cause of action.

Proceeding on the assumption, which appellee believes to be fallacious, that multiple causes of action are involved, one finds cases to the effect that the joinder mentioned in Rule 18 is permissive but not mandatory.

Although a single cause of action may not be split, failure to join several separate causes of action in a single proceeding, although they *could* all be litigated in the same action, is no bar to subsequent suit on the omitted causes of action (*Velsicol Corp. v. Hyman*, 103 F. Sup. 363; *Leimer v. Woods*, 196 Fed. 2d 828).

Appellee submits that neither of the two last cited cases are in point.

The *Leimer* case is a case under the old Rent Control Act where the government sought to restrain a defendant from overcharging his tenants, asked damages in the nature of rebating the amount of the overcharge, and further asked treble damages as punishment in accordance with the provisions of the act. The defendant asked for a jury trial on the question of damages. The lower court proceeded in equity on the subject of restraint, found such proper, and then held that the equity hearing on restraint settled the damage question too under the doctrine of *res judicata*.

The Appellate Court reversed and stated that the joinder permitted by Rule 18 was not such as to allow a denial of a substantive right, such as a trial by jury on the issue of damages. The court held that such was particularly true in the light of Rule 38 of the Federal Rules of Civil Procedure, permitting separate trials of causes of action joined together. The court said there would have to be a very strong ground indeed to justify a court in proceeding first in equity and denying a right to trial by jury on the question of damages instead of separating the actions, hearing the damage question before a jury and then, if appropriate, proceeding to the equitable matter of restraint.

The case does not really deal with whether or not there was a proper joinder (although it is implied that the joinder is proper) or whether or not a joinder is mandatory or permissive (on which nothing is said). The holding of the case is that a substantive right

cannot be denied a defendant by the application of Rule 18.

The *Velsicol* case deals with a defendant who made a number of discoveries while an employee of plaintiff, and, in violation of his contract of employment, refused to assign to plaintiff the patent applications for these discoveries. The court held that the plaintiff had no obligation to join all of these causes of action in a single suit against the defendant.

The *Velsicol* case deals with causes of action that arose at different times. One cause of action would mature, and the defendant would then enter into another series of acts which would result in another cause of action maturing and so on. This is to be distinguished from the case at bar where all relief sought was available to appellant at the time litigation was initiated in 10-297-C.

Whatever causes of action exist in the present controversy between appellant and appellee, they existed concurrently and arose out of the same transaction. They not only existed concurrently, but they arose concurrently. There was no "actual controversy" within the meaning of the Declaratory Judgment Statute, nor was there any question of reformation until the appellant brought its action in the Justice Court. The matters arose simultaneously.

In the light of a factual situation such as the one at bar, the simultaneous assertion of all forms of relief claimed to be due appellant, and the simultaneous assertion of all causes of action claimed by appellant

(if multiple causes of action there be) should be mandatory. At least such is the view of the *Hennepin* case, *supra*; and any policy to the contrary flagrantly violates the established, basic policy of such of the Federal Rules of Civil Procedure as are concerned with settling all issues present in a particular matter at one time.

As previously stated, if the claims of appellant arose by way of counterclaim and not complaint, joinder would be compulsory under pain of waiver (Rule 13 (a) *F.R.C.P.*).

Speaking of Rule 18, Barron and Holtzoff say:

“. . . Thus where the parties are the same, there is no restriction whatsoever. . . . Consequently there is no excuse for the piecemeal litigation of a claim and all grounds on which a claim for relief is based must be asserted and concluded in one action. . . .”

2 *Barron & Holtzoff's Federal Practice Procedure* 41-42.

“As to the joinder of causes of actions, the new rules introduce what might be said to be novel principle. They proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleading, but only from trying two or more matters together which have little or nothing in common. They therefore permit the joinder of practically anything, and the court is allowed in its discretion to make an order for the separate trial of any matters which can be more conveniently tried that way. This, of course, eliminates a great deal of dis-

cussion and argument over technical points respecting joinder.

“Where the parties are the same, there is no restriction whatsoever. . . .”

45 W.Va. L.Q. 5;

Commentary following Rule 18 at Title 28
U.S.C.A. p. 29.

Where the claims are against the same defendant, misjoinder is impossible in a civil action (*Atl. Lumber Corp. v. So. Pac. Co.*, 2 F.R.D. 313 at 314).

Federal Rule of Civil Procedure 18 seeks to avoid multiple litigation (*Rank v. Krug*, 142 F. Sup. 1). The reason for the rule is obvious. It seeks to wipe the slate clean between a single plaintiff and a single defendant as expediently as possible. It seeks to avoid the continuous vexation in court of one defendant by one plaintiff.

The case of *White v. Sinclair Prairie Oil Co.*, 139 Fed. 2d 103, was an action brought by one Mary to obtain royalties. Mary had previously lost title to the land on a mortgage foreclosure; and it subsequently passed to the lessors, the present owners, who leased the land to the oil company. The oil company made a contract with Mary whereby it gave her \$8,000, in return for which Mary ratified the lease held by the lessee oil company and agreed to consider this lease valid irrespective of the actual title to the land (Mary being in a dispute with the lessor as to the title to the land). The agreement further provided that Mary waived all of her claims against the oil

company except as to royalties to be paid. Mary brought a suit against the lessor seeking possession and title to the land and lost. Subsequently, suit was brought by the United States on behalf of Mary, an Indian, against the lessor and the lessee oil company in which title to the land was sought together with royalties to Mary on the grounds that she was the true owner of the land. Again Mary lost. The present case involved a suit by Mary against the lessee oil company for royalties based on the \$8,000 agreement, Mary contending that the agreement obligated the oil company to pay her royalties over and above what the oil company might have to pay the lessor owner.

Again Mary lost.

The court held that Mary's right to royalties was decided in the suit brought on her behalf in which both title and royalties were sought and that, thereafter, Mary could not base the same claim on some basis other than ownership, such as the \$8,000 agreement with the oil company. The ruling of the court was to the effect that the suit brought on Mary's behalf for title and royalties was *res judicata* as to her royalty rights, by virtue of title, the \$8,000 agreement or otherwise.

The court condemned Mary's course of litigation as 'piecemeal litigation'.

Certainly, the course of litigation followed by appellant, namely: Into the Justice Court and out of it to the District Court in A-13,001; attempting expansion by amendment in A-13,001; out of the District Court on the question of amendment and into the same court

seeking the same expansion in A-13,503; and appeal to this court; and the apparent intention to bring still another suit to enforce the contract "as reformed" in the event reformation is granted; is classic example of the "piecemeal litigation" which the Federal Rules, Barron & Holtzoff, the *White* case and innumerable cases concerned with *res judicata* the avoidance of circuitous litigation, and the condemnation of multiplicity of suits seek to avoid.

Where, under the liberal provisions of the Federal Rules of Civil Procedure, appellant could have sought all relief claimed at one time and did not, this court should limit appellant to the proceeding in A-13,001, bar appellant from further vexing appellee, adopt the logic and good policy of the *Hennepin* case, and affirm the judgment appealed.

**IS APPELLANT BARRED FROM MAINTAINING A-13,503 BY
VIRTUE OF THE DOCTRINE OF RES JUDICATA?**

The reasoning of the *Hennepin* case leads us logically to consideration of the doctrine of *res judicata*.

The *Hennepin* case holds, and such is logical and reasonable and wholly in keeping with the general policy of the Federal Rules of Civil Procedure, that

"Not only under the Federal Rules of Civil Procedure, but under the law of Indiana, the plaintiff could have, in the first action, sought a reformation of the contract, *and it was its duty to have done so if it desired to litigate that question. . . .*"
(Emphasis ours.)

153 Fed. 2d at 827.

The law is established that the doctrine of *res judicata* operates as a bar not only as to what was litigated but as to what could have been litigated (innumerable cases in Volume 18-6 *Decennial Digest*, 1207, *et seq.*, Key No.: Judgments 713 (2); *First Nat'l Bank in Wichita v. Luther*, *supra* at 265).

In view of the liberal provision of the Federal Rules of Civil Procedure and in furtherance of the policy against continuous vexing through litigation, appellee submits that the principle of *res judicata* should not be limited to matters that can be raised only in the particular court in which the initial remedy is sought, in this case the Justice Court; but that the principle of *res judicata* should extend to whatever courts were available to appellant at the time litigation was initiated. In other words, initially, appellant could have sought all three remedies claimed in the District Court. All three could have been there litigated at the same time. Appellant chose, instead, to seek a single remedy in the Justice Court. *Res judicata* should operate as a bar to reformation and declaratory judgment in A-13,503; because these are matters which, although admittedly not litigated in the Justice Court, could have been litigated at the same time the action in the Justice Court was initiated, had appellant seen fit to bring its action in the District Court.

The application of *res judicata* in accordance with the aforestated principle would bar appellant's claim to both reformation and declaratory judgment.

If this court sees fit, however, to limit the doctrine of *res judicata*, to matters actually adjudicated, appellee does not contend, under this limited application of the doctrine, that the declaratory judgment relief would be barred; but appellee does contend that, even under this limited application of the doctrine, the relief of reformation would be barred.

Appellant seems to think the remedy of a declaratory judgment might very well be *res judicata* and involve a re-determination of the meaning of the word "property".

"Appellant in this latter complaint also asks for declaratory judgment. It is true that this could involve a redetermination of the meaning of words as used by the parties in the contract."
(Appellant's Brief, p. 14.)

Although favorable to appellee, appellant cannot agree. Appellee believes that both the reformation and the declaratory judgment remedies are barred under the wide application of the *res judicata* doctrine above stated. Under the more narrow application of the doctrine, however, appellant feels that only the reformation remedy is within the doctrine.

Appellant admits that the sole question before the Justice Court was a definition of the word "property".

"The judgment then rendered by the Justice in the Justice Court (TR p. 17) ruled that appellant was not entitled to relief, and thus, decided that the word property, contained in the agreement (TR p. 6) meant only real property and that therefore the Appellant was not entitled to the

amount sued for which would have been due had the word property meant real and personal property.” (Appellant’s Brief, page 11.)

Appellant thus agrees that the meaning of the word property has been adjudicated; however, in keeping with his policy of vexing appellee with litigation, appellant, although it chose the Justice Court, is seeking re-adjudication on appeal in A-13,001.

Appellant is seeking a still further adjudication of the same question in its request for reformation in A-13,503. This is true irrespective of what appellant says in its brief.

“In examining the complaint in Cause No. A-13,503 (TR p. 27) as to the thing sued for, or the prayer for relief in that complaint, (TR p. 31) here Appellant asks that the court reform the instrument according to the intent of the parties, further, that the Court declare certain rights and duties under the contract entered into by the party, but no allegation is made that the Court declare that the word property, as used in the contract, mean real and personal property as the Justice Court in the first case already decided that as used in the contract it meant only personal property . . .” (Appellant’s Brief, page 13.)

This statement is inaccurate, and it is believed that appellant means, in the last part of the last quotation, that the Justice Court decided that the word “property” meant real property instead of, as stated, “personal property”.

Appellant’s contention in the above quote, that his reformation prayer in A-13,503 merely seeks the refor-

mation of the instrument according to the intent of the parties and does not seek a declaration that the word "property" means real and personal property is plainly misleading. Of course, appellant is asking that the contract be reformed to spell out real and personal property. Why else would appellant want the contract reformed? Certainly appellant does not want the contract reformed so as to define property unequivocally as being real property. Appellant's desires in asking, in A-13,503, that there be a reformation of the instrument in accordance with the intent of the parties, were made obvious by the stipulation of April 22, 1958, filed herein subsequent to the printing of the transcript of record, but, by stipulation, made a part of the record, wherein appellant states its contention as to the true intent of the parties, namely, that the word "property" means real and personal property.

Appellant strongly contends that the reformation sought is identical to the matters adjudicated by the Justice Court and now pending in A-13,001.

In the light of the foregoing, let us examine the four essentials to *res judicata* as propounded by appellant (Appellant's Brief, page 12), quoting Mr. Justice Holmes in *Hyman v. Regenstein*, 222 Fed. 2d 545 at 549.

Appellant admits that items three and four of Mr. Holmes' requirements have been met, namely, identity of persons and parties to the action, and identity of the quality in the persons for or against whom the claim is made.

Appellant contends that point number two, identity of the cause of action, has not been met. There is but one cause of action here. Appellant is confusing multiple remedies arising out of a single cause of action with multiple causes of action.

So far as requirement number one, identity of the thing sued for, is concerned, appellee submits that the thing sued for in reformation is the identical thing decided by the justice, namely, a definition of the word "property" with the aim of collecting money under the contract. Indeed, with respect to this entire transaction, and there is but a single transaction and a single cause of action, appellant has stipulated that "the sole question to be decided herein is whether or not the word 'property' as used in said contract means real property or whether it means real and personal property." (Appellant's Brief, pages 10-11.)

SUMMARY.

Appellee contends:

1. A judgment should be affirmed although the reason for its entry, as stated, is erroneous.

2. The judgment below should be affirmed as a matter of policy favoring the expeditious determination of litigation.

3. The pendency of A-13,001 bars appellant from the reformation relief sought in A-13,503.

4. Appellant is estopped from maintaining A-13,503.

5. Appellant has waived its right to maintain A-13,503.

6. We are concerned with but a single cause of action and multiple remedies.

7. The doctrine of election of remedies bars appellant from maintaining A-13,503.

8. The Federal Rules of Civil Procedure prohibit the maintaining of A-13,503.

9. *Res judicata* prohibits the maintaining of A-13,503.

Only an affirmance of the judgment below will support the policy of the Federal Rules of Civil Procedure and the many doctrines directed to the prohibition of unjustifiable, vexatious litigation.

The judgment below should be affirmed.

Dated, Anchorage, Alaska,

April 28, 1958.

Respectfully submitted,

BUTCHER & DUNN,

By JOHN C. DUNN,

Attorneys for Appellee.

No. 15,788

IN THE

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE,
a municipal corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

REPLY BRIEF FOR APPELLANT.

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FILED

PAUL P. HENNING



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REPLY BRIEF FOR APPELLANT.

INTRODUCTION.

Appellant and Appellee have already set forth statements of the case and no further statement is necessary, however one point in Appellee's statement should be considered for clarification. Appellee says in his statement of the case (Appellee's brief, page 3): "Counsel for Appellant and Appellee have stipulated that this Court may consider the fact that, in 10-297-C, George C. Shannon and B. W. Boeke testified that the intent of the parties was that 'property' meant real and personal property, and that George G. Jackson testified that the intent of the parties was that 'property' meant real property alone." It is stipulated

that this was the testimony elicited in the Justice Court, however, unless this Court makes it part of the record it should not be considered as part of the record, and Appellant has not stipulated that it may be considered. The stipulation as to the testimony in the Justice Court is not material to a determination of this appeal. Appellee has indicated ten primary questions which he considers necessary to a determination of this appeal. Appellant's argument will follow as closely as possible Appellee's brief except that Point 1 and Point 10 will be considered together at the beginning.

ARGUMENT.

APPELLEE'S ARGUMENTS 1 AND 10.

Appellee's first statement suggests agreement with our position that the Court erred, at least in its reasoning. Appellee says: "The reason stated by the District Court for entering the judgment appealed from is immaterial." (Appellee's brief, page 7.) Appellant submits, no further reason for dismissing Appellant's complaint can be found. Appellee does attempt to support the ruling of the District Court in its 10th Point, although it seems inconsistent with the first argument. Appellee states: "The law is established that the doctrine of *res judicata* operates as a bar not only as to what was litigated but as to what could have been litigated." (Appellee's brief, page 43.) Appellant has urged that the remedy of reformation and the issues involved in reformation

could not have been litigated in the Justice Court. (Appellant's brief, page 8.) Nor could a declaratory judgment be sought. Appellee fails to show specifically what issues have been or could have been litigated in the initial cause of action in the Justice Court. Appellee then takes the apparent erroneously applied principle of *res judicata* and asks this Court to extend that principle to whatever courts were available. (Appellee's brief, page 43.) Appellee cites no authority for this novel theory, apparently an original one. The final blow to the principle of *res judicata* as a valid reason that will sustain dismissal of Appellant's complaint is dealt by Appellee on page 44, where Appellee says: "If this Court sees fit, however, to limit the doctrine of *res judicata* to matters actually adjudicated, Appellee does not contend under this limited application of the doctrine, that the declaratory judgment relief will be barred, but Appellee does contend that, even under this limited application of the doctrine, the relief of reformation will be barred." Appellant argues if any claim for relief can stand then the Court erred in dismissing the complaint. The proper remedy would have been a motion to strike the improper portions.

APPELLEE'S ARGUMENT 2.

The second point, Appellee raises for consideration by this Court (Appellee's brief, page 8) seems to be a matter of policy Appellee hopes will be adopted. Appellant's mistake was to begin in the Justice Court.

When this case was appealed it attempted by way of amendment (Transcript page 19) to settle everything in one action which was denied when the Court denied Appellant's motion for leave to amend. (Transcript page 26.) As authority for Appellant's "policy" argument Rule 13, Federal Rules of Civil Procedure is quoted, which rule applies to counterclaims. Appellee assumes that declaratory judgment would be futile. (Appellee's brief, page 13.) For purposes of a motion to dismiss, the allegations in the complaint are considered as true, whether or not relief prayed for would be futile depends on the merits of the case and thus should not be considered by this Court.

APPELLEE'S ARGUMENT 4.

Appellee then queries "Is Appellant estopped from maintaining A-13,503?" (Appellee's brief, page 13.) Appellee is confused. First he indicates that Appellant thought that a judgment in the Justice Court would conclude the matter then urges that the Appellee had a right to rely on the fact that an appeal to the District Court would end litigation. Further confusion is added when Appellee misstates the fact by saying: "In opposing the amendment to the complaint in A-13001." (Appellee's brief, page 14.) Appellee opposed the motion to amend the complaint. Further references in this argument are to annoyance, expense and inconvenience, which language runs consistently through the Appellee's brief as an apparent attempt to appeal to the emotions.

APPELLEE'S ARGUMENT 5.

The next argument apparently deals with waiver. (Appellee's brief, page 15.) No authority is urged to back Appellee's argument of waiver as the basis of dismissing Appellant's complaint. It is difficult to see how plaintiff-appellant can waive a right it did not have, that right being a right to sue for reformation and to bring an action in the nature of declaratory judgment, said action not being within the jurisdiction of the Justice Court.

APPELLEE'S ARGUMENT 6.

Although Appellee queries "Are there multiple causes of action here or but a single cause of action in multiple remedies?" (Appellee's brief, page 16.) This question proposed by Appellee is left unanswered, although the declaratory judgment act is discussed. True, the declaratory judgment act is procedural but the allegations in Appellant's complaint (Transcript page 27) which for purposes of this appeal must be taken as true present a different factual situation than do the allegations in the complaint in the Justice Court in Cause No. 10-297-C. (Transcript page 3.) The two complaints (Transcript page 3 and page 27) do not involve the same cause of action or claim for relief.

APPELLEE'S ARGUMENT 7.

Appellee then deals with election of remedies (Appellee's brief, page 19) citing certain authorities, the first of which was *U. S. v. Oregon Lumber Co.*, 260 U.S. 290. It should be noted that in the above cited case certain remedies were available to the Government and the case began in a Court of General jurisdiction. Appellee has quoted extensively from the *Oregon Lumber* case in which the plaintiff-government proceeded to judgment. In this action the remedy of reformation and procedure under the declaratory judgment act were not available to Appellant in the Justice Court. When the proceeding came to the District Court on appeal Appellant attempted to amend by adding the additional claims for relief or counts in the full belief that all the matters in dispute between the two parties could be tried in one suit. Appellee then urges that a declaratory judgment asking the contract be declared void is inconsistent with the suit on a contract to enforce the same. Appellant agrees, that at some point an election must be made but the Federal Rules, Rule 8, provide for alternative and inconsistent pleading. No election need be made at the pleading stage. Appellee then urges with some doubt that the doctrine of election of remedies also bars the suit for reformation. (Appellee's brief, page 23.) Again the reply but reformation was not available in the Justice Court and also it is not inconsistent. Appellee conveniently discusses certain cases which hold that a suit on a contract is no bar to a later suit for reformation. (Appellee's brief, page 24.) However, as Appellee has found cases not favorable

he does not favor the court nor the Appellant with the names of such cases. Appellee then discusses *Einsiedler v. Massari*, 78 Atl. 2d 572. The suit in that case went to judgment and the appeal was affirmed. Then the defendant attempted to start a new action seeking reformation. Here Appellant sought reformation in the District Court when the remedy became available for the first time. When not allowed to amend, Appellant filed a new complaint. In *Hennepin Paper Company v. Fort Wayne Corrugated Paper Company*, 153 F. 2d 822, cited by Appellee (Appellee's brief, page 26) the first suit was begun in the District Court and went to judgment, unlike the instant case. Appellant submits that there is no inconsistency between a suit on a contract in the Justice Court for a determination of the meaning of the word "property" and a suit to reform the contract. Although the judgment in the Justice Court was unfavorable to Appellant and the word "property" was interpreted in favor of the Appellee, this should not bar a later suit for reformation where the Appellant is able to prove the necessary facts to entitle him to a reformation. Appellee seems to confuse the doctrine of election of remedies with some theory of election of Courts which he proposes as a logical extension. The doctrine of election of remedies implies that the remedy was available at the time the election was made. Appellant attempted to avail itself of all remedies when they became available in the District Court as is shown in the motion for leave to file amended complaint. (Transcript page 20.) Further discussion of the *Hennepin* case by Appellee (Appel-

lee's brief, page 29) does point out the fallacy of Appellee's earlier argument about inconsistent remedies.

APPELLEE'S ARGUMENT 8.

Next Appellee queries "What acts constitute a conclusive election under the doctrine of election of remedies?" (Appellee's brief, page 31.) In proposing this doctrine Appellant assumes that the initial suit based on the complaint (Transcript page 3) was the same as the later suit for reformation. Appellant submits the first suit begun in the Justice Court (Transcript page 3) after the stipulation was entered into became a suit for an interpretation of a contract. Reformation is not the same as interpretation. (*Corbin on Contracts*, Volume 3, page 54.) In *Sadowski v. General Discount Corporation*, 81 F. Supp. 381, plaintiff lost a suit on a contract, then brought a suit to reform. It was held in that the first suit was not *res judicata* and apparently no election of remedies had been made as the two suits were not inconsistent. This case was affirmed in 183 F. 2d 592 allowing the second suit where the Court said the second suit to reform should be allowed; the ruling was partially based on the fact that under Michigan Law the Courts of Law and the Courts of Equity were separate. Here Appellant is faced with partially the same problem. The Justice Court is a Court of limited jurisdiction and certain types of suits, namely, the equitable suits are not allowed. (Opening brief, page 8.)

APPELLEE'S ARGUMENT 9.

Appellee next queries "Do the Federal Rules of Civil Procedure bar Appellant from maintaining A-13,503?" (Appellee's brief, page 36.) Appellee apparently has no answer to this question either but asserts (Appellee's brief, page 42), this Court should affirm the dismissal of the complaint based on "logic" "and good policy". Appellee submits that there is every reason to avoid piecemeal litigation. Had the District Court not ruled at Appellee's urging that the complaint could not be amended there would still only be one case. It would seem part of Appellee's vexation is at his own doing.

CONCLUSION.

As Appellee has not sustained the burden of upholding the District Court's dismissal of Appellant's action, it is urged that the District Court be reversed and the cause remanded and Appellee be required to answer.

Dated, Anchorage, Alaska,
May 8, 1958.

Respectfully submitted,

JAMES M. FITZGERALD,
City Attorney, City of Anchorage,

L. EUGENE WILLIAMS,
Assistant City Attorney, City of Anchorage,

Attorneys for Appellant.



No. 15789

United States
Court of Appeals
for the Ninth Circuit

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER, Appellants,

VS.

FRANCES SHENK HESTER, also known as
Frances Shenk Hester Gardner and WIL-
LANE HESTER HAYNES, Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division

FILED

FEB 18 1958

PAUL P. O'BRIEN, CLERK



No. 15789

United States
Court of Appeals
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HELEN MAY GARDNER GLASER and
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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58 Sutter Street,
San Francisco, California,

Attorneys for Defendants.

In the District Court of the United States, Northern District of California, Northern Division

No. 7102

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER, Individuals,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, HARVEY V. HIGLEY, as Administrator of Veterans Affairs and his Successors in Such Office as Such, FRANCES SHENK HESTER, Also Known as FRANCES SHENK HESTER GARDNER, and WILLANE HESTER HAYNES,
Defendants.

COMPLAINT

Plaintiffs complain of defendants, and for causes of action allege:

First Cause of Action

I.

That Harvey V. Higley is a duly appointed, qualified and acting Administrator of Veterans Affairs of the Veterans Administration, an independent agency of the United States of America, and that the United States of America is a sovereign nation.

II.

That a contract of National Service Life Insurance was entered into by and between William E.

Gardner, Jr., deceased, and the United States of America on the 1st day of December, 1942; that said contract was evidenced by National Service Life Insurance Certificate #N7,745,410; that said contract of insurance was renewed and said renewal was evidenced by policy #V-12,207,555.

III.

That the said William E. Gardner, Jr., fully and faithfully performed all of the covenants and conditions required of him by the contract evidenced by the said certificate and policy.

IV.

That the said William E. Gardner, Jr., died on the 16th day of March, 1952; that upon the said date of his death, the said contract of insurance was in full force and effect.

V.

That as a result of the death of the said William E. Gardner, Jr., the proceeds of the said contract of insurance became due and payable to his properly designated beneficiaries as provided by law.

VI.

That on or about the 14th day of September, 1950, under the provisions of the said contract of insurance, the said William E. Gardner, Jr., deceased, designated George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, as the sole and principal beneficiaries thereunder, share and share alike.

VII.

That on the 14th day of September, 1950, when the said George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, were designated the beneficiaries under said contract of insurance, the said William E. Gardner, Jr., wrote a letter addressed to the said George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, in words and figures as follows:

“P. O. Box 1318
Palo Alto, Calif.
Sept. 14, 1950

Dear Helen & Bob,

I'm enclosing a copy of the change of insurance benificery that I just mailed into 49 - 4th St., The Veterans Administration, S. F.

The same witness signed both the copy sent in and this one being sent to you.

Just keep it for your own reference, if you would ever need it. There is no reason for any question of feelings in why I'm doing this.

I liked the way you presented yourselves as a real brother and sister with my two boys when I was over this last Saturday. I was mighty proud of you.

It really helped my inner self. Made me happy.

I realize that the insurance written your way would mean that you would be careful in it being spent for them. I know you would really have a thought for them in every way practical.

Just keep this to ourselves and thanks a million.

I'll probably be over to Sacto. around the 5th of Oct.

Love,

Bill."

VIII.

That as a result of the designation of beneficiaries as described in VI and VII above, the designees George R. Gardner and Helen May Gardner, now Helen May Gardner Glaser, became entitled to the proceeds of the said policy of insurance upon the maturity thereof, for and on behalf of the minors William E. Gardner III, and James R. Gardner.

IX.

That on the 6th day of October, 1950, an order was issued by the Honorable Jay L. Henry, Judge of the Superior Court of the State of California, in and for the County of Sacramento, detaining the decedent, William R. Gardner, Jr., for supervision, treatment, care, or restraint; that said order also recited that the decedent was mentally ill; that on the 10th day of October, 1950, the decedent was adjudged to be mentally ill and was sent to the Veterans Hospital in Palo Alto, California.

X.

That plaintiffs are informed and believe, and therefore allege on information and belief, that the judgment of mental incapacity was never repealed, changed, modified or expunged from the records in any way; that no certificate showing that decedent was formally discharged as recovered, or that he was rated as competent, was ever filed by the Vet-

erans Administration or a chief officer thereof with the County Clerk of the County of Sacramento in accordance with the provisions of Section 1664 of the Probate Code of the State of California, as amended.

XI.

That on or about September 14, 1950, when plaintiffs George R. Gardner and Helen May Gardner Glaser were designated beneficiaries of the said policy of insurance, the decedent, William E. Gardner, Jr., was of sound mind; that subsequent to that date, he suffered physical and emotional deterioration and increasingly severe mental aberrations.

XII.

That on or about the 30th day of April, 1951, on which date the said decedent purported to change his beneficiaries, and as a direct and proximate result of the aforesaid mental and physical incapacities, decedent lacked the mental ability and capacity to enter into, modify, or change a contract.

Second Cause of Action

And for a second, separate and distinct cause of action, plaintiffs allege as follows:

I.

Incorporate by reference hereinto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of Plaintiffs' First Cause of Action, with like force and effect as if the same and each of them were herein set forth.

II.

That on or about September 14, 1950, when plaintiffs George R. Gardner and Helen May Gardner Glaser were designated beneficiaries under the said policy of insurance, the decedent, William E. Gardner, Jr., was of sound mind; that subsequent to that date, he suffered physical and emotional deterioration and increasingly severe mental aberrations; that on or about the 30th day of April, 1951, on which date the said decedent purported to change his beneficiaries, and as a direct and proximate result of his physical, mental and emotional ill-health, he lacked testamentary capacity.

Third Cause of Action

And for a third, separate and distinct cause of action plaintiffs allege as follows:

I.

Incorporate by reference hereinto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of Plaintiffs' First Cause of Action, with like force and effect as if the same and each of them were herein set forth.

II.

That between the 14th day of September, 1950 and the 30th day of April, 1951, upon which latter date the said decedent purported to change his beneficiaries, decedent was subject to undue influence and coercion exerted by the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, to which undue influence and coercion his

physical, mental and emotional illness made him particularly susceptible.

III.

That as a direct and proximate result of the aforesaid coercion and undue influence exerted upon decedent by the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, he was induced to preclude the natural objects of his bounty, viz., his children, from receiving any benefits from or under the said contract of insurance, substituting in their stead the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and one Willane Hester Haynes.

IV.

That plaintiffs are informed and believe, and therefore allege on information and belief, that the said Willane Hester Haynes also exerted undue influence and coercion upon the decedent; that the said Willane Hester Haynes is the daughter of the said Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and was not a natural object of decedent's bounty.

Wherefore, Plaintiffs pray as follows:

1. That the beneficiaries designated on September 14th, 1950, be recognized as the sole and true beneficiaries of decedent, subject, however, to the terms and provisions of the letter of the same date set forth in haec verba hereinabove.

2. That the purported change of beneficiaries of

April 30, 1951, be declared null and void and of no force or validity.

3. That the proceeds due under the said policy of insurance be paid to the plaintiffs George R. Gardner and Helen May Gardner Glaser, as trustees for the minors William E. Gardner, III and James R. Gardner.

4. That the defendants Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and Willane Hester Haynes take nothing under the said policy of insurance.

5. That the Administrator of Veterans Affairs, Harvey V. Higley, or his successors in such office, be ordered forthwith to turn over the proceeds of said policy of insurance to the beneficiaries George R. Gardner and Helen May Gardner Glaser, as trustees for the minors William E. Gardner, III and James R. Gardner.

6. For such attorneys' fees as are allowed by law.

7. For costs of suit incurred herein.

8. For such other and further relief as to the Court may seem just.

Demand for trial by jury is hereby made.

/s/ GEORGE R. GARDNER.

/s/ HELEN MAY GARDNER GLASER.

Duly Verified.

[Endorsed]: Filed August 2, 1954.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and Willane Hester Haynes, two of the defendants, answer plaintiffs' complaint:

As to the First Cause of Action

I.

Expressly admit the allegations contained in paragraphs I, II, III, IV and V.

II.

Answering the allegations contained in paragraphs VI, VII, IX and X, these answering defendants have no information or belief upon the subject of any allegations thereof sufficient to enable them to answer said paragraphs and, basing their denial upon such ground, deny each and every allegation thereof.

III.

Answering the allegations of paragraph VIII, these defendants deny each and every allegation thereof.

IV.

Answering the allegations of Paragraph XI, these defendants deny each and every allegation thereof.

V.

Answering the allegations of paragraph XII, these defendants deny each and every allegation thereof.

As to the Second Cause of Action

I.

Answering paragraph I of the alleged second cause of action, these defendants refer to and incorporate by reference, as if fully set forth herein, all of their allegations, denials and admissions contained in their answer to the alleged first cause of action.

II.

Answering the allegations of paragraph II, these defendants deny each and every allegation thereof.

As to the Third Cause of Action

I.

Answering paragraph I of the alleged third cause of action, these defendants refer to and incorporate by reference, as if fully set forth herein, all of their allegations, denials and admissions contained in their answer to the alleged first cause of action.

II.

Answering the allegations of paragraph II, these defendants deny each and every allegation thereof.

III.

Answering the allegations of paragraph III, these defendants deny each and every allegation thereof.

IV.

Answering the allegations contained in paragraph IV, these defendants deny each and every allegation thereof, with the exception that Willane Hester

Haynes is the daughter of Frances Shenk Hester, also known as Frances Shenk Hester Gardner.

Further Answering Plaintiffs' Complaint, and each and every alleged cause of action contained therein, these answering defendants deny generally each and every allegation contained therein not hereinbefore expressly admitted or otherwise denied.

Wherefore, these answering defendants pray:

1. That plaintiffs take nothing by way of their complaint.
2. That the proceeds due under the policy of insurance referred to in plaintiffs' complaint be paid to these answering defendants as the persons who are legally entitled to such proceeds.
3. That the Administrator of Veterans Affairs, Harvey V. Higley, or his successors in office, be ordered forthwith to turn over the proceeds of such policy of insurance to these answering defendants who are the beneficiaries thereof.
4. For their costs of suit herein.
5. For such other relief as may be proper.

APPEL, LIEBERMANN &
LEONARD,
/s/ CYRIL APPEL,
EVANS, THWING, JAQUA &
O'REILLY,

Attorneys for Defendants, Frances Shenk Hester,

aka Frances Shenk Hester Gardner, and Willane Hester Haynes.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 29, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS
UNDER RULE 36

Plaintiffs, Helen May Gardner Glaser and George R. Gardner, individuals, request defendants Frances Shenk Hester, also known as Frances Shenk Hester Gardner, and Willane Hester Haynes, individuals, within 10 days after service of this Request, to make the following admissions for the purpose of this action only, subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents exhibited with this Request, is genuine.

A. Report of Physical Examination, Mather Field, California, dated May 25, 1942.

B. Proceedings of Army Retiring Board, convened under the provisions of AR 605-250 in the case of 1st Lieutenant William E. Gardner, Jr., O-1639062, Signal Corps, held on the 2nd day of February, 1945.

C. Report of Physical Examination at De Witt General Hospital, dated February 1st, 1945.

D. Application for Hospital Treatment or Domi-

ciliary Care, dated 25 November, 1946, signed by William E. Gardner, Jr., and supporting documents.

E. Application for Hospital Treatment or Domiciliary Care, dated 13th of January, 1948, signed by William E. Gardner, Jr., and supporting documents.

F. Final Summary, Birmingham Veterans Administration Hospital, Van Nuys, California, dated December 4, 1948, and cover letter.

G. Psychiatric Report on William E. Gardner, Jr., dated July 29, 1949, signed by B. Brownfield, M.D., Psychiatrist, Outpatient Service, Veterans Administration Hospital, Palo Alto, California.

H. Hospital Record, Veterans Administration Hospital, San Francisco, California, signed by S. W. Bergreen, M.D., for the period October 6, 1949, to November 8th, 1949.

I. Letter from Henry Mayer, M.D., to Veterans Administration District Office, Disability Insurance Claims Division, 1509 Clay Street, Oakland 12, California, dated October 19, 1949.

J. Hospital Records — Letterman General Hospital, San Francisco, California, for period November 11, 1949 to November 18, 1949.

K. Veterans Administration, Report of Physical Examination, Veterans Administration Regional Office, dated March 15, 1950.

L. Medical Report — Veterans Administration

Hospital, Palo Alto, California, for period October 11, 1950, to December 22, 1950.

M. Abstract of Claims File—Veterans Administration Regional Office, San Francisco, California, dated October 31, 1950.

N. Report of Hospitalization for Insurance Purposes — Veterans Administration Hospital, Palo Alto, California, dated December 28, 1950.

O. Certificate of Death — William Ellsworth Gardner, Jr., showing date of death as March 16, 1952.

P. Letter from Veterans Administration to Jesse E. Fluharty, Attorney at Law, dated September 29, 1952.

2. That each of the above listed documents is admissible into evidence under the provisions of Sections 1732 and 1733 of Title 28 of the United States Code.

Dated: This 21st day of February, 1957.

/s/ JESSE E. FLUHARTY,
Attorney for Plaintiffs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 28, 1957.

[Title of District Court and Cause.]

STIPULATION IN RE GENUINENESS
OF DOCUMENTS

A request for the admission of the genuineness of that certain set of documents marked A through P having been made on behalf of plaintiffs and served on defendants, on February 21, 1957, it is hereby stipulated by and between the parties hereto that said documents and each and every one of them is genuine. It is further stipulated by and between the parties hereto that defendants reserve all objections as to the competency, materiality or relevancy of each and every one of said documents, and each and every part thereof, and this admission of the genuineness of such documents is not an admission of the competency, materiality or relevancy of any of such documents or of any part thereof.

Dated March 29, 1957.

/s/ JESSE E. FLUHARTY,
Attorney for Plaintiffs.

APPEL, LIEBERMANN &
LEONARD,

/s/ By ALEXIS J. PERILLAT,
Attorneys for Frances Shenk Hester, aka Frances
Shenk Hester Gardner & Willane Hester
Haynes.

[Endorsed]: Filed April 1, 1957.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 20th day of June, in the year of our Lord one thousand nine hundred and fifty-seven.

Present: The Honorable J. Frank McLaughlin, District Judge.

[Title of Cause.]

This case came on regularly this day for trial before the Court sitting with a jury. Jesse E. Fluharty, Esq., was present for and on behalf of the plaintiffs. James S. Eddy, Esq., Assistant U. S. Attorney, was present for and on behalf of the U. S. Alexis J. Perillat, Esq., was present for and on behalf of the defendants Frances Shenk Hester Gardner and Willane Hester Haynes. James S. Eddy was excused as the United States was not participating in the trial of the case.

The Court impanelled a jury as follows: Miss Helen F. Hansen, Thomas H. Plummer, Thomas M. Ford, Mrs. Josepha A. McVay, Joe McCullough, Earl L. Young, Mrs. Willa M. Spencer, Mrs. Eme-line G. Sprague, Mrs. Viola P. Volkers, Ferdinand D. Simoni, Mrs. Eleanor S. Simonsen, William R. Yeager.

The foregoing persons were sworn as jurors to try the issues joined in this case.

After opening statements by respective counsel,

plaintiff marked for identification Plaintiff's Exhibits A to P, incl., O-1, Q to Z, incl., AA to AI, incl. Plaintiff's Exhibits A, B, D to H, J, K, L, N, O-1, and S were admitted into evidence. George Robert Gardner, Mrs. Helen Glaser and Mrs. Leilia Gardner were sworn and testified for and on behalf of the plaintiffs, and the plaintiffs rested. Thereupon Mr. Perillat made a motion for a directed verdict in favor of the defendants. After hearing the attorneys in the absence of the jury, and due consideration having been had thereon, it is Ordered that the motion be and the same is hereby Granted. The Court thereupon instructed the jury to bring in a directed verdict for the defendants. Mrs. Willa M. Spencer, Juror No. 7, was appointed foreman of the jury by the Court, and signed the form of verdict presented to her by the Clerk. Thereupon the Court Ordered that judgment be entered in accordance with the verdict. The jury was then excused until further notice. Attorney's fees for Mr. Perillat set by the Court at the ten per cent statutory fee.

In The United States District Court, Northern
District of California, Northern Division

No. 7102

HELEN MAY GARDNER GLASER, et al.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

JUDGMENT ON DIRECTED VERDICT

This cause having come on regularly for trial on the 20th day of June, 1957, before the Court and a jury of twelve persons duly impaneled and sworn to try the issues joined herein; Jesse E. Fluharty, Esq., appearing as attorney for the plaintiff, and James Eddy, Assistant United States Attorney, and Alexis J. Perillat, Esq., appearing as attorneys for the defendants, and the trial having been proceeded with on the 20th day of June in said year, and oral and documentary evidence on behalf of the plaintiff having been introduced and closed, and the defendants' motion for a directed verdict and the arguments thereon, and the Court being fully advised in the premises, It Is Ordered that the motion for a directed verdict be and the same is hereby granted, and thereupon the jury were instructed to bring in a verdict for the defendants, which was ordered recorded on the minutes of the Court and which verdict is as follows:

“We, the Jury, find in favor of the Defendants

as we have been directed by the Court, Willa M. Spencer, Foreman.”

It is therefore Ordered that judgment be entered herein in accordance with the verdict and with costs.

Dated: June 20th, 1957.

C. W. CALBREATH,

Clerk,

/s/ By EDWARD C. EVENSEN,
Deputy Clerk.

Entered In Civil Docket June 22, 1957.

[Endorsed]: Filed June 22, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice of Appeal is hereby given that Helen May Gardner Glaser and George R. Gardner, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of June 20, 1957, sustaining a motion for a directed verdict and from the final judgment entered in this action on June 22, 1957.

Dated: August 19, 1957.

JESSE E. FLUHARTY & LANDIS,
BRODY & MARTIN,

/s/ By ALVIN LANDIS,

Attorneys for Appellants, Helen May Gardner
Glaser and George R. Gardner.

[Endorsed]: Filed August 20, 1957.

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS

Appellants, plaintiffs in the above entitled action, intend to rely upon the appeal of the above entitled action upon the following points:

1. The District Court erred in deleting the word "suicide" from Plaintiffs' Exhibit "O-1" before admitting it in evidence.

2. The District Court erred in refusing to admit into evidence Plaintiffs' Exhibit "T".

3. The District Court erred in refusing to admit into evidence Plaintiffs' Exhibit "U".

4. The District Court erred in refusing to admit the testimony of Plaintiff Helen May Gardner Glaser pertaining to the conversation with William E. Gardner, Jr.

5. The District Court erred in refusing to admit into evidence Plaintiffs' Exhibit "A-1".

6. The District Court erred in refusing to admit the testimony of the witness Leila G. Gardner.

7. The District Court erred in granting the motion for direct verdict for the defendants.

8. The District Court erred in entering judgment for defendants.

Dated: November 14, 1957.

JESSE E. FLUHARTY and

LANDIS, BRODY & MARTIN,

/s/ By ALVIN LANDIS,

Attorneys for Appellants, Helen May Gardner
Glaser and George R. Gardner.

[Endorsed]: Filed November 14, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above entitled case, and that they constitute the record on appeal herein as designated by the plaintiffs.

Complaint.

Answer.

Motion to join third parties as plaintiffs.

Order of joinder.

Request for admissions.

Stipulation in re genuineness of documents.

Plaintiffs' memorandum prior to trial.

Defendants' trial memorandum.

Disclaimer of Bonnie Lucille Gardner Swanson.

Plaintiffs' proposed instructions.

Defendants' proposed instructions.

Minute order of June 20th, 1957.

Verdict of the jury.

Judgment on directed verdict.

Notice of appeal.

Cost bond on appeal.

Order extending time to docket appeal.

Order extending time to docket appeal.

Appellants' statement of points.

Designation of the record on appeal.

Deposition of Ernest Frederick Russell, M.D.

Deposition of Richard G. Boyce.

One (1) volume Reporter's Transcript.

Plaintiffs' Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, O-1, P, Q, R, S, T, U, V, W, X, Y, Z, AB, AC, AD, AE, AF, AG, AH and AI.

Copy of Docket Entries.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 15th day of November, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By C. C. EVENSEN,
Deputy Clerk.

In The District Court of the United States
Northern District of California,
Northern Division

No. 7102

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER, individuals,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, HARVEY V.
HIGLEY, as Administrator of Veterans Af-
fairs and his successors in such office as such,
FRANCES SHENK HESTER, also known as
FRANCES SHENK HESTER GARDNER,
and WILLANE HESTER HAYNES,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Reporter's Transcript of Proceedings Had On
Trial On June 20, 1957.

Appearances: For the Plaintiff: Jesse E. Fluharty, Esq., 926 J Street Building, Sacramento, California. For Defendant United States of America: James S. Eddy, Esq., P. O. Building, Sacramento, California. For Defendants Hester and Haynes: Alexis J. Perillat, Esq., San Francisco, California. [1*]

* * * * *

Mr. Fluharty: The first document, and counsel has a copy of it, I would like to offer, is Document No. A, which is a report of physical examination by the Mather Field Facility of the United States Army which is signed by Cleveland R. Steward, Lt. Col., Medical Corps, Joseph F. McDonough, Major, Medical Corps, and Donald K. Barstow, First Lieutenant, Medical Corps.

Mr. Perillat: If the Court please, we object on the basis of incompetency, irrelevancy and immateriality. These documents are not one set of documents received in the regular [87] course and scope of business in accordance with Title 18, Section 32.

Mr. Fluharty: If the Court please, of course, we have argued this one matter at length yesterday, and I merely will reiterate the argument we made yesterday. These documents have been admitted to as genuine under a request for admissions, and their materiality and competency would be with respect to whether or not a medical record of the United States Army would be admissible.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

The Court: I can't read this photostat. Is this a hospital record?

Mr. Fluharty: It's from Mather Field and three doctors have signed it, your Honor. "Report of Physical Examination" at the Mather Field Facility, United States Army. Of course, it's our contention, too, these documents will not only come in as Hospital Records, but also official records of the United States Government.

The Court: This admission as to genuineness takes the place as to certification?

Mr. Fluharty: Yes, your Honor. It is our contention it would come in under Section 1733 of Title 28, sub-section A, which is, "The books or records of accounts or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, or transaction or occurrence as a memorandum of which the same were made or kept." [88]

If the Court please, the request for admissions is based on the language of the rules which is the genuineness. The word "Genuine" being a generic term, would also include being kept in the regular course of business. Now, the relevancy and the materiality I will admit is open to question, whether it's relevant to show when the increasing attacks of grand mals and petit mals began, I believe is a perfectly valid objection, and I think we have a starting point somewhere in our evidence, and this would be the starting point in 1952 that he was competent.

And then we intend to show through records of

the Government and the hospitals these increasing attacks.

The Court: The objection is overruled.

Mr. Fluharty: Thank you, your Honor.

Mr. Perillat: Will the Court allow us to be heard with authority?

The Court: No.

The Clerk: Plaintiffs' Exhibit A admitted, your Honor?

The Court: Yes.

The Clerk: Plaintiffs' Exhibit A admitted into evidence.

(Report of physical examination referred to was marked Plaintiffs' Exhibit A and received in evidence.)

The Court: Admitted on the basis of the admission of genuineness, which is Section 3133, Title 28.

Mr. Fluharty: Now, ladies and gentlemen of the Jury, these [89] reports are rather long and involved; and, if we were to read the entire mass of them to you, it would take a considerable length of time, much longer than I believe any one of us would want to be here, so I'm going to take the privilege of reading what I feel to be important sections.

Now, opposing counsel will also have that privilege, if he so desires, to read the entire record into the evidence, or to read portions thereof.

Now, in addition to that, since it has been admitted into evidence, I'm sure the Court will inform you you may have the right to examine these docu-

ments yourselves in your deliberations. So, at this time, this is "The Report of Physical Examination." It says: "(See AR 40-100 and 40-105)," and I believe "AR" stands for "Army Regulations." It's signed by Cleveland R. Steward, Lt. Col. Medical Corps, Joseph F. McDonough, Major, Medical Corps, and Donald K. Barstow, First Lieutenant, Medical Corps. And it's with respect to William E. Gardner, Jr., a civilian, and down in the lower, right hand column, across the bottom it has the notation "Physically qualified," with initials, "S.J.S." And on the back it says, "Remarks on defects not sufficiently described," and it says "None." In "Corrective measures, or other action recommended, None." And it shows Mather Field, California, May 25, 1942.

Now, the next bit of evidence that I have to offer, your Honor, is the proceedings of the Army Retiring Board convened [90] under the provisions of Article of War (sic) 605-250 in the case of First Lieutenant William E. Gardner, Jr., O-1629062, Signal Corps, with its supporting Exhibits A through F, and at this time I offer this into evidence on the same terms and conditions as the previous.

The Court: Now marked "B" for identification.

The Clerk: Plaintiffs' Exhibit B has been marked for identification.

Mr. Perillat: Does the Court wish me to continue to renew my objections?

The Court: Yes.

Mr. Perillat: I offer the same objections.

The Court: This is a Government document; same ruling. It may be received in evidence.

The Clerk: Plaintiffs' Exhibit B admitted into evidence.

(Proceedings of Army Retiring Board were marked Plaintiffs' Exhibit B and received in evidence.)

Mr. Fluharty: At the heading of this document it says "Proceedings of the Army Retiring Board convened at the DeWitt General Hospital on the 2nd day of February, 1945, of the following orders": And then it lists a number of orders out of the official Army Hospitals, which I will not present to you. At the beginning of it, the Board convened at 10:00 o'clock and present were Lt. Col. Charles E. Gibson, Quartermaster Corps; Major Robert R. Keeler, Infantry; Major Donald C. Malcolm, [91] Medical Corps; Major Victor E. Hermansen, Field Artillery; Major Clarence E. Snow, Medical Corps. Absent were Lt. Col. Richard R. Brady, Medical Corps; Major Norman W. McMillen, F.D.; Major Arthur A. Koepsel, Medical Corps; Major Arthur C. Kinsley, C.E.

The introductory paragraph says: "William E. Gardner, Jr., First Lieutenant, O-1039062, Signal Corps, appeared before the Board pursuant to paragraph 14, Special Orders 27, DeWitt General Hospital, Auburn, California, dated 31 January, 1945, which is hereto attached, marked Exhibit C, and stated that he did not desire Counsel.

"The order convening the Board was then read, and Lieutenant Gardner was asked if he had any

objection to offer to any member present, to which he replied in the negative.

“The members of the Board, the Recorder, and the Reporter were then duly sworn. The officer before the Board was then duly sworn and made the following statement:”

Now, the part I feel to be pertinent on this page is:

“Maj. Miller: Lieutenant Gardner, will you please state briefly the cause and nature of any disability that you might have?

“A.: I understand it started the middle of December, 1942. I understand I have idiopathic epilepsy, cause unknown. I have never had anything like it before in my life. I had a slight head injury at Fort Monmouth while on a field problem.

“Maj. Miller: What date? [92]

“A.: The middle of December, 1942. I was on the double run and hit my head on the bough of a tree and was knocked to my knees. I had nothing prior to this time. I talk with my family about it and they had no knowledge of epilepsy being in our family.”

Skip a few pages to page 4. In the middle of the page, Major Malcolm says:

“Approximately how many attacks has he had each year since then?

“A.: The attacks which began in December, 1942, have increased in severity to the extent that this officer has had three to four attacks per week, sometimes more and sometimes less.”

And then we will go to page 6 of this document. The last four lines, in which it recites:

"The President of the Board asked the officer before the Board if he wished to make an oral or written statement, to which he replied that all statements made were correct."

"The Board was then closed for deliberation and having maturely considered the case finds:

"That First Lieutenant William E. Gardner, Jr., O-1039062, Signal Corps, is incapacitated for active service. That said incapacity is the result of an incident of service. That the cause of said incapacity is epilepsy, mixed type, grand mal and petit mal. That the cause of said incapacity is an incident [93] of service. That said incapacity originated on or about 28 December, 1942. That said incapacity is permanent.

"The Board reopened and the President of the Board announced the findings to Lieutenant Gardner, and advised Lieutenant Gardner in writing of his right to file application for pension.

"The Board adjourned at 10:36."

Signed "Charles E. Gibson, Lt. Col., Q.M., President. R. W. Miller, Major, M.A.C., Recorder,"—which I believe is "Medical Administration Corps."

And then attached to this in the back is a brief clinical abstract. And the pertinent portions of it—

Mr. Perillat: Excuse me, counsel, I don't believe I have these in the same order you have, so, if I may interrupt you—

Mr. Fluharty: "This patient was admitted to the

8th General Hospital on 7 November, 1944, complaining of fleeting and transitory memory lapses, which began on 28 December, 1942, while teaching class at Fort Monmouth, New Jersey. A grand mal seizure and many petit mal seizures were observed overseas. He was evacuated and admitted to this hospital. Here petit mal and grand mal seizures were observed by medical officers.”

And then, counsel, the next page, next two pages later——

Mr. Perillat: I don't have that which was just read.

Mr. Fluharty: Would you like to look at this then?

Mr. Perillat: I don't have some of these things that counsel was reading from. [94]

The Court: Just a minute.

Mr. Fluharty: He was served with a copy of the entire thing.

The Court: Something happened to the copies?

Mr. Perillat: It's still in its original form as I received it, your Honor.

The Court: You should have them if you are charged with admitting they are genuine.

Mr. Perillat: That, again, goes to my objection because this is not one composite record, as he stated yesterday, from one institution. This has been a collection of papers from all over.

Mr. Fluharty: This is a report of physical examination from the hospital; and, if he hasn't received a copy of it, although I mailed them to him and I have an affidavit of service of mail from

my girl, I would be happy not to read this one because it is a repetition of previous material, your Honor.

The Court: The important thing, anyway, is the man was discharged with physical disability. There are two problems: One is your legal objection, the other is whether or not there has been any variation between the copies you were given to react to as genuine or whether they were different.

Do you have this clinical material attached to your copy of Exhibit B at all? [95]

Mr. Fluharty: Yes.

The Court: No, I'm asking Mr. Perillat. What's the last page you have?

Mr. Perillat: I have quite a volume of pages, but I have been having trouble trying to follow counsel.

The Court: Do you find it now?

Mr. Perillat: "Disposition of Board proceedings." Is that what you are reading?

Mr. Fluharty: May I show you?

Mr. Perillat: Surely.

The Court: Find it now? Is it complete?

Mr. Perillat: Yes, sir.

Mr. Fluharty: Do you have the medical abstract?

Then we have a medical abstract which is rather short.

The Court: Is it an exhibit for identification?

Mr. Fluharty: No, it's the same exhibit.

The Court: "B" in evidence?

Mr. Fluharty: Yes, which a portion of it reads as follows:

“A grand mal seizure and many petit mal seizures were observed overseas. He was evacuated and admitted to this hospital. Here petit mal and grand mal seizures were observed by medical officers.”

And that's the end of the reading from this document, your Honor. [96]

The Court: Couldn't we shorten this procedure up? I understand from the opening statement there is no dispute but what the man had epilepsy.

Mr. Fluharty: Well, your Honor, what I intend to show, as we go through these documents, the epilepsy became increasingly severe and he went into psychosis. This is merely preliminary. This is the end of the preliminary matter.

The Court: Well, all right, but don't be going over too much detail.

Mr. Perillat: If the Court please, may I make an objection on the basis of the offer of this evidence that, unless he ties up this epilepsy with any kind of organic disease, I am going to object to all of this evidence which he is going to offer on that subject unless he is going to tie it up with expert testimony.

The Court: That is right.

Mr. Perillat: I may give your Honor the case which holds directly a man may have an epileptic seizure an hour before he executes his will, so that is no evidence of incapacity and the basis for my objection. Unless counsel is prepared to tie up

medically these two different distinct types of illnesses, why, then I think the objection should be sustained or at least subject to a motion to strike if he hasn't done that.

Mr. Fluharty: I think we have. On the other hand, your Honor, these medical reports will show that many of the reports, [97] as I have stated in my opening statement, do indicate that this man was mentally incapacitated and had increasing severity of attacks, plus the general breakdown, which resulted in the commitment. Of course, since the man is not here, the only way we can do it is through these medical records, and I'm reading very small portions of the record, I can assure you, your Honor, just one or two paragraphs.

The Court: I will overrule the motion to strike at the moment. You may continue. You may renew your point subsequently after I get a better grasp of what's going on.

Mr. Perillat: Thank you, your Honor.

Mr. Fluharty: Exhibit C for identification I will not read from.

The Clerk: Plaintiffs' Exhibit C marked for identification.

Mr. Fluharty: I am not offering that.

The Court: Just remained marked for identification.

The Clerk: Yes, your Honor.

The Court: Incidentally, ladies and gentlemen of the jury, things marked for identification are not in evidence. They are simply tags put on things so we can know what we are talking about.

Juror No. 1: It's sometimes difficult to hear the attorneys.

The Court: All right. I will ask them to speak louder. [98] Thank you for speaking. Of course, sometimes when they are talking to me, it isn't important for you to hear, but I will ask them to speak louder.

While I think of it, throughout this case, as in every case, the attorneys are not on trial.

Mr. Fluharty: The next I offer into evidence, your Honor, is Plaintiffs' Exhibit D for identification.

The Court: What is it?

Mr. Fluharty: Exhibit D——

The Court: Yes.

Mr. Fluharty: —— is an Application for Hospital Treatment, or Domiciliary care with The Veterans Administration, and I offer it as a document of the United States Government.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit D admitted into evidence.

(The Application for Hospital Treatment and Domiciliary Care was marked Plaintiffs' Exhibit D in evidence.)

The Court: Proceed.

Mr. Fluharty: This Plaintiffs' Exhibit D, attached to the top of it, is a certificate of Hospital Treatment or Domiciliary Care, Certificate of Eligibility, and approval, and shows that William Gardner, Jr., it states on here, is eligible for hospital treatment. And then it refers to "See attached

correspondence," and it's signed by J. L. Reigt, Medical Doctor. The certificate itself is an application for [99] hospital treatment or domiciliary care and signed at the bottom thereof by William E. Gardner, Jr. On the second page it says, "Brief history: Nervous condition. See attached sheet." And it's signed by C. Dwight Yates, Examining Physician of the V.A.

On the attached sheet is a history in which the second paragraph—I'm sorry. We will go on to the third paragraph.

"Last Saturday, two days ago, while at home, patient suddenly became very weak, and felt as though he were going to lose consciousness. This was accompanied by a severe constricting type headache."

And down at the bottom under the physical examination section it says, "Refer to Neurologist, possible recent cerebral organic change."

And I offer that into evidence.

The Court: It has been received.

Mr. Fluharty: The next that I offer is Plaintiffs' Exhibit E.

The Court: "E" for identification?

Mr. Fluharty: Yes, your Honor. "Application for Hospital Treatment or Domiciliary Care, Veterans Administration." And I offer that on the same terms as before.

The Court: That's a different application than the other one?

Mr. Fluharty: Yes, your Honor. [100]

The Court: Then it may be in evidence.

The Clerk: Plaintiffs' Exhibit E admitted into evidence.

(Application for Hospital Treatment or Domiciliary Care was marked Plaintiffs' Exhibit E in evidence.)

Mr. Fluharty: This one is an application for hospital treatment or domiciliary care of William E. Gardner, Jr., and the pertinent provision of this is on the second page thereof in which there is a brief history of petit mals with occasional grand mals and convulsive type seizures since 1942. He's taking dilantin, 1/10 gram tid & Mebarol, from 4 to 12 grains, a day. "Despite this, he is having daily petit mal attacks, one to two times, with occasional incontinence of urine and feces. Symptoms: Irritability, confusion, mild blackouts without falling but occasional sphincter incontinence." And diagnosis once again is "Epilepsy, grand mal and petit mal. He has not been hospitalized for about four years and treatment in a hospital is advised. Recommended: Hospitalization at Sawbello." Signed: "Kenneth G. Rew, Medical Doctor, January the 15th, 1948."

The Court: Excuse me. We will take our 11:00 o'clock recess.

Ladies and gentlemen of the jury, I am going to tell you now and refer to it later without repetition, that while you are jurors, you are part of the Court and, hence, there are certain ground rules you have to observe. First of all, you cannot [101] talk about this case with anyone, including fellow jurors, nor let anyone talk about it in your pres-

ence. Do refrain from making up your minds until you hear the entire case. Also, do not loiter in the hallways or fraternize with any of the parties or the parties' attorneys or witnesses. Remain aloof and uncontaminated. Remain qualified jurors.

(Whereupon a recess was taken.)

The Court: Note the presence of the jury. You may continue.

Mr. Fluharty. Thank you, your Honor.

The next exhibit that I offer into evidence, if the Court please, is Plaintiffs' Exhibit F for identification which is from the Birmingham General Hospital. The final summary from the case in the Birmingham General Hospital, Van Nuys, dated December 4, 1948.

The Court: Is this a Federal Hospital?

Mr. Fluharty: Yes.

The Court: All right. It may be received.

The Clerk: Plaintiffs' Exhibit F admitted into evidence.

(Summary report on case from Birmingham General Hospital, marked Plaintiffs' Exhibit F in evidence.)

The Court: Please move along a little more rapidly.

Mr. Fluharty: Yes, your Honor. I'm referring now to the letter of transmittal that was sent to the Veterans Administration Hospital in Palo Alto under the signature "A. P. Willis, Registrar, from the Birmingham General Veterans Administration [102] Hospital in Van Nuys, California, and it's

a medical abstract; and, on the second page, the last sentence of paragraph 1, the statement is that: "The patient was discharged from DeWitt General Hospital on 3/19/45 with a diagnosis of grand mal and associated petit mal epilepsy, and was placed on Dilantin, grain 4½ daily. However——"

Then going into the second paragraph:

"However within recent months the patient has experienced several financial set-backs and marital difficulties. These factors have been aggravated by increasing frequency and severity of seizures. He entered Birmingham Veterans Administration Hospital for a complete examination."

"Initial impression was: Epilepsy, grand mal and petit mal."

Now, on page 2, the last two paragraphs:

"While hospitalized the patient had been placed on various combinations of anti-convulsants consisting of Tridione, Dilantin, Phenobarbital. At present the patient is taking Tridione, Gr. 9, Dilantin, Gr. 7½, Phenobarbital, Gr. 1½ daily with good results. On 29 March the patient became markedly disturbed and violent and somewhat confused. This happened to follow a petit mal seizure. He was transferred to a locked ward overnight and appeared to recover adequately during that time. He was subsequently placed in an open ward and no further abnormalities of behavior were noted."

The diagnosis once again was, "Epilepsy, grand mal and petit mal, idiopathic type."

Signed "D. H. Mansel, M.D., Ward Physician."

The Court: Next?

Mr. Fluharty: Now the next we have, your Honor, is Exhibit G, which we offer, which is an Out-patient Service of the Veterans Administration Hospital, Palo Alto, of B. Brownfield, Medical Doctor, Psychiatrist, and it's an out-patient report. It has attached to it the clinical data which is approved by Robert E. Kantor, Chief Clinical Psychiatrist. And we offer this in evidence as Plaintiffs' Exhibit G.

The Court: Is that a Federal Hospital?

Mr. Fluharty: Yes, your Honor.

Mr. Perillat: May I ask the date of the report be given for the benefit of the jury?

Mr. Fluharty: July 29, 1949.

We have now went through seven years of reports, your Honor.

The Court: They may be received in evidence.

The Clerk: Plaintiffs' Exhibit G admitted into evidence.

(Out-patient report of Palo Alto Veterans Hospital marked Plaintiffs' Exhibit G in evidence.)

Mr. Fluharty: The first page, Psychiatric Report on William E. Gardner, Jr. July 29, 1949.

"Patient was seen once on December 8, 1948, but felt that [104] he needed no psychiatric help then. On June 3, 1949, he returned on the advice of Dr. Roberts, V.A., Oakland, asking for psychiatric help, and has been seen on June 6, July 7, 11, 13, 15, 19, 27 and 29, 1949.

"The patient has spent much of the time discussing the treatments he has received elsewhere and

asking for reassurance that his seizures would be helped by psychiatric care. In his visits, he has shown much verbal egression, which is barely disguised, against the Creator, who seems to be representative to him of all authority figures, and of his father, who deserted his mother when the patient was seven years old. All this hostility and a dependency upon others for reassurance and support is thinly veiled. Some paranoid trends are evident but thus far no psychotic evidence is present.

“Prognosis for psychiatric treatment seems fair for the development of mere insight. This could improve his seizure condition.

“Signed B. Brownfield, M.D., Psychiatrist, Out-patient service, VAH PA.”

The second page at the top, and this is dated July 8, 1949, which they say “Tests administered: Rorschach, Bender-Gestalt. Psychological examination was requested for diagnostic information. The patient is subject to frequent epileptic attacks of grand mal and petit mal types, with onset in 1942. Evidence of psychological involvement is sought, as well as assessment of the adequacy [105] of his defense mechanisms. The Rorschach and Bender-Gestalt were administered to the patient, who needed much reassurance and showed great concern for the quality of his performance.

“Personality evaluation: Intellectually, the patient is of high average intelligence, but his productivity is severely restricted by the rigid intellectual control that he must use in dealing with his environment. His perception of reality is more de-

terminated by his inner needs than by objective factors which results in quite idiosyncratic perceptual processes."

Down at the bottom we have a "Diagnostically, the patient presents the picture of a paranoid personality with compulsive trends. He is not presently psychotic; however, the extensive projection, the difficulty in distinguishing reality, and the nature and strength of the defense mechanisms indicate that a psychotic break is possible if additional stress from the environment is met.

"Prognosis for psychotherapy is guarded since his motivation is to seek answers to the causal factors of his epilepsy rather than a genuine desire for help. His anxiety is minimal and is primarily related to 'why' and not to 'I am uncomfortable in my present condition.' A relationship with this patient is possible only if he is reassured (1) that his dependency upon a therapist is not dangerous, (2) that he will not be rejected, and if (3) the possibility of libidinal impulses toward the therapist is recognized. [106]

"Summary: This patient is basically a paranoid personality whose present picture is that of a compulsive neurotic. His defense of denial, rigid over-control, repression, projection, compulsion, and reaction formation are primarily directed against unacceptable hostile impulses, overwhelming dependency needs, and homosexuality.

"Suggested diagnosis: Paranoid personality type with compulsive trends, chronic, severe.

“Approved: Robert E. Kantor, Chief Clinical Psychologist.

“Presented by: J. Humphrey and A. Ossorio.”

Next we have, your Honor, is Plaintiffs' Exhibit H for identification which is a clinical record and final summary on the Veterans Administration Form 10-2614, from the Veterans Administration Hospital, San Francisco, California, date of admission, October 6, 1949, and we offer that into evidence as a Government Hospital record.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit H admitted into evidence.

(Clinical record of Veterans Admn. Hosp., San Francisco, marked Plaintiffs' Exhibit H in evidence.)

Mr. Fluharty: This showed he was admitted by the Veterans Administration at 10:40 A.M. on October 6, 1949. The last sentence of the first paragraph under “Brief history” shows that: “These attacks became gradually more severe and frequent until he experienced a major convulsive state with some [107] intercurrent attacks of petit mal. Just prior to his entry into the hospital the patient was having six to eight grand mal attacks per day which were not being controlled by medication.

“Status on admission: Patient was admitted for uncontrollable convulsive state which had become more severe about one week prior to admission. It was noted on admission that patient tended to be somewhat hyperactive with psychomotor accel-

eration and markedly extrovertive type of personality.

“Hospital course: Patient was started on Dilantin for control of seizures. The dosage was built up to grains $1\frac{1}{2}$ daily. This dosage was again increased to six such doses daily and again increased later during hospital course to 7/10 grams daily. Seizures decreased somewhat under medication. However, the patient’s adjustment in the hospital became markedly poor. It was noted on admission that he had tended to be somewhat over-talkative, over-responsive, and hyperactive. As seizures decreased, these changes became more pronounced, and about three weeks after his admission, patient became psychotic, he showed a rather marked thinking disturbance, a marked increase of psychomotor activity, insisted upon writing quite a bit of non-understandable material, would talk to practically anyone in the hall extensively and loudly, and became a problem on the open neurological ward, and was transferred to the closed psychiatric ward on 11/3/49. Open ward privileges could not be allowed [108] due to the condition of the patient at this time. Patient apparently became quite upset concerning his being transferred to a closed psychiatric ward, his seizures had been absent during the period of psychotic behavior until the time of his being signed out by his family on 11/8/49, when he once again began to have seizures. The family was notified that the patient was both physically and mentally ill and that there was a possibility of an expanding type of lesion of the brain as indi-

cated by his last EEG. Family was also notified that the patient at the present time was not considered mentally competent, and there was a possibility that the patient could develop a status epilepticus if removed from treatment. Family persisted in their demands and against medical advice signed the patient out.

"Diagnosis: (1) Convulsive state, grand mal (with psychosis at time of discharge), treated, unimproved.

"Prognosis: Probably poor.

"Status on discharge: (1) Epileptic status, improved over entry. (2) Mental status, poor.

"Status of service connected disability: Unimproved.

"Intent: Treatment and control of convulsive state with improvement of present symptoms.

"Operation: (1) Lumbar punctures, Dr. B. F. Hansen, 10/11/49.

"Disposition: AMA.

"Admitted: 10/6/49. Discharged: November 8, 1949. [109]

"Signed: S. W. Bergreen, M.D."

Plaintiffs' Exhibit No. I will be passed.

The Court: "I" for identification passed.

Mr. Fluharty: The next exhibit we offer into evidence is a record of the Letterman's General Hospital of San Francisco, San Francisco, California, dated December 6, 1949, addressed to the Veterans Administration Regional Office, 49 Fourth Street, San Francisco, California, and states, "Transmitted herewith final summary pertaining

William E. Gardner as per your request of 6 December, 1949." And attached to it are the records of the Letterman General Hospital.

Mr. Perillat: What was the date?

Mr. Fluharty: December 6, 1949.

Mr. Fluharty: We offer that as the official record of the United States, and Veterans Administration Hospital.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit J admitted into evidence.

(Letterman General Hosp. record Dec. 6, 1949, marked Plaintiffs' Exhibit J in evidence.)

Mr. Fluharty: Second page, this page is entitled "Final Summary," ladies and gentlemen, and at its beginning it says: "William E. Gardner, Registry No. 303-024. Date of admission, 11 November, '49, date of discharge 18 November, '49.

"This 30-year-old white married veteran was admitted to [109-A] the neurosurgical service of Letterman General Hospital 11 November, 1949, as a transfer from the Palo Alto Hospital. History obtained from outside sources indicates that since 1942 when he suffered a head injury he has been subject to uncontrolled grand mal convulsions. A month ago he entered the Palo Alto Hospital for further study of his convulsions. At that time he showed no gross abnormalities of his mental status. On 2 November he went on pass to take care of some personal business. He returned in what was called a manic excitement, and had to be confined in a locked ward. On 8 November he signed his

release from the hospital. On 10 November he was found in his room with first and second degree burns of his right ear, right wrist and shoulder. The cause of his injuries was not determined but it was thought he sustained them during a seizure. He was returned to the hospital and then transferred to LGH to be studied for possible neurosurgical complications of the injury. At LGH he was confused and in poor contact. He expressed numerous bizarre paranoid delusions and attempted to fight with the ward personnel. It was necessary to sedate him with IV amytal and to put him in restraints. On 17 November he was given neurosurgical clearance and was transferred to the closed ward. Mental status examination revealed a mental content of a paranoid schizophrenic. He was expansive and grandiose with bizarre delusions of miraculous powers, etc., auditory hallucinations, etc. [109-B] However, he was more easily managed than on the neurosurgical ward and on 18 November he was released to his mother's custody to be placed in a nursing home.

"Except for the burns described above, physical examination was essentially negative.

"Laboratory and X-ray studies were normal.

"Diagnosis: (1) Epilepsy grand mal with psychosis, severe, unimproved. (2) Burns, first and second degree, right ear, right wrist and shoulder, treated, improved.

"Signed: E. J. Koller, Capt., MC, Neuro-psychiatric Service.

"Information hereon transcribed from retained

medical records. Henry A. Hardt, Major, Assistant Registrar."

Mr. Perillat: If the Court please, for the record at this time I shall renew my objection as to the—not only the competency and materiality, but specifically to the relevancy of the documents that are now being gone into. The date we are dealing with is April 30, 1951, and counsel is reading from documents that date back more than two years.

The Court: That is true.

Mr. Fluharty: I might point out, your Honor, my offer of proof heretofore made. We were showing the increasing frequency of the attacks, a course of action, and, as we have already gone into, we have now gone over seven years of records, and we have done it in a remarkably short time, your Honor, and [110] we are now in the nub of the thing; so, within this very short period of time, the pertinent actions are before the Court.

The Court: The objection interpreted as a motion to strike is denied. Proceed.

Mr. Fluharty: The second page is an "Application for Hospital Treatment or Domiciliary Care," and it shows "Cardinal Hotel, Palo Alto." "Permanent address, unknown." "William Gardner," and the "Active military Naval History," so forth, it says "Unknown," and "Admitted as emergency, unable to give information."

Counsel, if we can go down to the clinical record, general physical examination, which is a few pages down.

Now, under "Clinical record, General Physical Examination," it says at the top:

"General appearance and mental status: Well developed and nourished 30-year-old white male, dazed and confused, but at present tries to be co-operative. Find it difficult to give history because of sleepiness and post-convulsive confusion."

Under "Eyes," we have, "Marked ecchymosis about left eye. Fundi: Normal. External ocular movements: Normal. Pupils react well to light.

"Ears and nose: Right external ear is markedly swollen. There is a serious drainage from the right ear. The right tympanic membrane is broken." [111]

And then the bottom of the next page, Counsel, under "Initial impression, (1) Epilepsy, grand mal, idiology undetermined. (2) Fracture, skull, face, right, sustained in epileptic seizure on November 19, 1949."

And then the last page is: "Established clinical diagnosis: Burns, first and second degree, right ear and face, right shoulder and forearm. Epilepsy, grand mal and petit mal, uncontrolled.

"(1) Epilepsy, grand mal, severe.

"(2) Psychotic reaction, paranoid, chronic, moderate, secondary to dg. 1, manifested by bizarre paranoid delusions, auditory hallucinations and aggressiveness.

"(3) Burns, neck, first and second degree, ear, wrist and shoulder, right, incurred November 11, 1949, San Francisco, California, circumstances unknown."

And that's the end of that report.

Now, the next report, your Honor, which we offer into evidence is a report of physical examination of the Veterans Administration, dated March 15, 1950, under the name of the Examiner, John L. Reiger, M.D., title Medical Examiner. And this is the Veterans Administration official form of the United States Government.

The Court: Very well. Received as——

The Clerk: Plaintiff's Exhibit K admitted into evidence.

(Report of Dr. John L. Reiger, March 15, 1950, marked Plaintiff's Exhibit K in evidence.) [112]

Mr. Fluharty: Now, the fourth page, counsel. Figure 19, under this physical examination, Veterans Administration, called "Nervous system," and has the question: "Are brain, spinal cord, peripheral nerves, and mentality normal?" They have on here: "See special report," and it goes on to say "Remarks: While this examiner was conducting the general physical examination the claimant had what might be characterized as a modified grand mal attack. He apparently lost consciousness for two or three minutes, his face became cyanotic, there were probably no two convulsive motions, there was no rectile or urinary incontinence. There was no biting of the tongue. Dr. Schatz and Dr. Bailey were called and saw the claimant in the terminal part of the seizure. Claimant rather quickly recovered and the rest of the examination was conducted."

“Residuals of gunshot wounds or other injuries?”
This is 27.

“Claimant was hospitalized at Letterman General Hospital from November 11, 1949, on transfer from V.A. hospital at Palo Alto because of burns of the head, shoulder, and forearm, according to their report in the case file. He was found in his room on November 11 with the burns. It was conjectured that the burns were sustained during a seizure. On examination today there is rather extensive scarring of the right external ear, pre-auricular area, and over the mastoid, there is [113] partial loss of the right external ear, scars are raised, red and disfiguring. There is mild burn scarring on the right shoulder and two small areas on the dorsum of the right wrist. There is one small area over the dorsum of the right thumb.”

And continued: “There is no limitation of motion of the joints from this skin scarring. In addition there is a surgical scar on the palmar aspect of the right wrist, I am unable to get any clear explanation for this, claimant denies having inflicted the laceration himself.

“Diagnosis: (1) Epilepsy, idiopathic type, grand mal and petit mal of nature, without psychosis. See N.P. Report.

“(2) Hypertension, essential, arterial, mild.

“(3) Scars, face and right upper extremity, residuals of recent burn.”

Mr. Perillat: May I ask you to read that again? I think there were a couple words you read wrong.

Mr. Fluharty: "(1) Epilepsey, idiopathic type, grand mal and petit mal——"

Mr. Perillat: It's the next word.

Mr. Fluharty: I believe it's "native."

Mr. Perillat: It's off of the paper. Read the whole thing through again, if we may, your Honor. When they photostated it, a part of the word was left off the page.

Mr. Fluharty: "Epilepsy, idiopathic type, grand mal and [114] petit mal——" and it looks like an "f" there—"Nature, without psychosis. See N.P. report.

"(2) Hypertension, essential, arterial, mild.

"(3) Scars, face and right upper extremity, residuals of recent burn."

The next one we offer, your Honor, is the hospital records of the voluminous V.A. Hospital in Palo Alto, California.

Date of admission, October 11, 1950, and this is the official report of the United States Government, and of one of the Veterans Administration Hospitals of the United States Government.

The Court: It may be received as——

The Clerk: Plaintiffs' Exhibit L admitted into evidence.

Mr. Fluharty: This is October 11 of 1950. V.A. Administration Hospital, Palo Alto. Admitted by V.A. direct. And it's First Lieutenant Gardner, William E. Under "Established Clinical Diagnosis: (1) Epilepsy, idiopathic, grand mal, with psychotic reaction of agitated, confused type, chronic,

mild, in remission, manifested by frequent epileptiform seizures, agitated combative impulsive behavior, irritability, paranoid trends and periods of mental confusion.

“(2) Scarring and keloid formation, right anterior and post auricular areas, and pinna, residual burn.”

These are voluminous, and I am not going to go into too many of them. [115]

On the history of the patient up at the top, on the history, it says at the very top of the page:

“Patient committed by Sacramento County. Patient states: Quote, ‘I have epilepsy and happened to get off my medication and combined with drinking I had a period of confused behavior.’ Close quotes.”

And then in the middle of the history—the page, “He continued to take phenolbarbital as the only medication to control his seizures, having only occasional ‘flicker spells’ which again occurred only in the mornings. The patient went into business for himself as a building contractor in which he did very well, netting approximately \$30,000 in the first year. He continued with phenolbarbital as a medication sporadically until November, 1949, when he had a ‘grand mal seizure’ in a Palo Alto Hotel. During this seizure he fell against a steam radiator, burning the right side of his face, his right ear, and fracturing his skull. He was admitted to VA-PA for several hours, and then shipped to Letterman General Hospital for further diminutive treatment. Altogether he was hospitalized for ap-

proximately two months following this incident. When the patient had recovered from his injuries, he was placed on Dilantin, of 6 tablets per day, and his seizures remained under control until approximately two weeks ago when he gradually discontinued his medication to about two tablets daily. The present episode which brought him [116] to the hospital occurred October 5th when at his mother's apartment in Sacramento he became suspicious of his mother and brother, thought they were trying to keep him from reaching the police and thought that other people he knew were tying him in with a dope racket. He attempted to contact the police by telephone from a store near his home but was not satisfied. He set out to the police station and accepted a lift from a woman who was passing in an automobile; and, when she attempted to stop her automobile and run away, he began to fight with her and struck her several times. The police finally arrived and took him to jail, from where he was transferred to the Sacramento County Hospital and sent to VA-PA October 12, 1950."

Continuing on into clinical record, psychological data, counsel, quite a ways down. This is the clinical record, psychological data, dated October 21, 1950.

"Tests administered: Wechsler-Bellevue Intelligence Scale. Rohrschach. Bender-Gestalt.

"Reason for referral: The patient was referred for psychological testing to evaluate, (1) The extent of psychotic thinking, and (2) His capacities for impulsive, errative behavior.

"III. Psychological evaluation: The patient is above average in intelligence and does not show evidence of deterioration of his intellectual capacities, per se, due to brain damage. At present he feels he [117] is under scrutiny, and he is making an effort to appear normal and sensible. He is quite guarded and cautious in revealing himself. Although there is a surface appearance of normality, when he is put under emotional pressure, his control weakens and shows evidence of bizarre and unrealistic thinking of a psychotic nature.

"He is unsure of his own control over his strong impulses, and he inhibits his spontaneous reactions and feelings. He feels comfortable expressing strong feelings only when they are clearly justified. However, he reacts to minor frustrations with strong feelings, and as he tries to hold these back, the pressure builds up inside him.

"His brittle control may break, and he reacts in an impulsive, erratic manner, or else he may distort reality in a paranoid manner and find reasons to justify the expression of his hostilities. During these periods his behavior will be psychotic and unpredictable.

"He appears to feel quite threatened by the loss of control during his seizures, and this may be an important factor in his distrust of his own capacity to express his emotions without becoming overwhelmed by them. It is possible that if he could be helped to express his feelings in moderation, he might feel less threatened and have less need to distort reality to justify his emotions.

“Suggested diagnosis: Epilepsy, idiopathic, manifested by psychotic reaction, mild. [118]

“Presented by: B. C. Finney and B. Martin. Approved by: Richard C. Hamister, Ph.D. Supervisor Testing Section, Clinical Psychology Service.”

And then if we can go down a ways, September 22, closing statement. And now we have on December 22, 1950, the final progress note and it's entitled in this section, “Doctor's Progress Notes.” And then we go on down here to the mental status.

“Patent on leaving was free of psychotic thinking, showed continued evidence of belief and mild feelings that the police had mistreated him in Sacramento and that this was somewhat of a trumped-up charge in that he did not choke the woman, which was stated on the petition for commitment, but that he only beat her up. He revealed no evidence of epileptic confusion; is clearly oriented, alert, spontaneous and overtly friendly. He retains a basic, very infantile and narcissistic personality trait in which he is very hostile to any reverse of his decisions, complete inability to accept any authority, especially male authority, and a very demand, hostile type of verbal attacks when refused his wishes, and no evidences of violent physical attacks other than his striking Dr. Johnson when first admitted; at which time it was felt he was still suffering from his acute psychosis.”

And then to the next page which we have the diagnosis and the prognosis: [119]

“Diagnosis: Continued with psychosis mild in complete remission.”

And then the prognosis: "As expected prognosis regarding future psychotic break is highly guarded. Enough evidence for future difficulties is present in that the relationship with Mrs. Hester is a very tenuous one, based upon highly neurotic reasons. The attitude of the patient's mother is very much against any successful adjustment between Mrs. Hester and the patient. The patient's own narcissistic needs and his demanding hostile attitude may prevent fulfillment of his desires to complete photograph school and indeed interfere with his adjustment outside more and more, especially so in such environmental factors, such as his mother and Mrs. Hester may change their attitude toward him. As regards his epilepsy, he at the present time has no seizures, however it is felt this is due to his continuing passive living while in the hospital situation. It is noted by the patient that these seizures come and go directly related to his emotional tension, and it is felt these may recur as emotional tension becomes unbearable. It was felt previous to his leaving the hospital that his relationship with Mrs. Hester was the best of a very poor circumstance and his leaving here was also the best of a very poor situation, but that it was hoped that his stay here and some partial insight which we were able to give him and his accepting the hospital routine in spite of his demands may have offered him some opportunity for further improvement outside the hospital. [120]

"Signed: R. S. Mowry, M.D."

The Court: It is twelve o'clock. We will stop

at this time. Observe our noon recess until 1:30.

Bear in mind the Court's instructions concerning your conduct as jurors. 1:30.

(Whereupon a recess was taken until 1:30 p.m. of the same day.) [121]

Afternoon Session, 1:30 P.M.

The Court: Note the presence of the jury, parties present. You may proceed.

Mr. Fluharty: Counsel, we can go a little bit further on to November 23, 1950, psychological data.

The Court: In Exhibit what?

Mr. Fluharty: It's the one we were——

The Court: L, the last one?

Mr. Fluharty: The last one, yes.

The Clerk: That was L.

Mr. Fluharty: We are continuing to read, ladies and gentlemen of the jury, the hospital records at the Palo Alto General Hospital for this period, October 11, 1950, to December 22, 1950, and we are not going backwards in time, but because the report has been set up in Sections, Social Data, Clinical Data, and so forth, I am now reading another report which is under the heading "Psychological Data." And it reads as follows:

"Tests administered: Thematic apperception test, Minnesota multiphasic personality inventory, House-Tree-Person test.

"Purpose: Personality evaluation prior to discharge.

"Evaluation: During psychological examination,

the patient cooperated at a superficial level. He was expansive and grandiose regarding his past achievements and future occupational plans, and his plans to take care of his future wife and two children (by a former marriage). His certainty of his ability to deal with his mother, who is possessive toward him and opposes his marital and occupational plans, also appeared unrealistic. His discussion of all these problem areas appeared naive and narcissistic.

“The patient is actually very resistive to testing. He tends to interpret any approach to him as some sort of test, and he is trying very hard to ‘pass’, as his chief conscious goal is to leave the hospital. He has attempted to exploit people toward this end, trying to secure their aid by superficial over-compliance, assertions of his ability, and denial of hostility. He frequently tries to have third persons intercede for him, to manipulate one another towards his ends.

“His behavior exhibits the hostility which is denied verbally. His verbalizations reveal strong passive dependent tendencies and a high degree of suggestibility.

“The results of psychological examination indicate that he has just average intelligence, which is insufficient to achieve and maintain his grandiose goals. The actual level of his intelligence is a particular problem to him, as it conflicts not only with his self-concept but also with the judgment of others, who generally think him more intellectually competent than he is and may therefore expect too much of him.

"The psychological tests give a fairly liberal translation of the patient's inter-personal behavior and statements [123] about himself. Thus his behavioral defenses are seen to be quite rigid, making it difficult to infer the underlying dynamics directly from his tests.

"There is evidence of a large passive-dependent need, against which his over-determined need for money, power, and appearance of success apparently serves as a reaction formation. His epileptic seizures must threaten this reaction formation, which is felt to have existed in his personality prior to the first onset of seizures. He has probably reacted to the threat by more desperate but less effective use of a defense which might otherwise have worked well enough.

"The patient has considerable unconscious confusion about his relationships to both men and women. In men he apparently seeks a kind father figure, but actually expects only hostility and rejection, so he is basically hostile toward them and unable to relate to them in other than a highly manipulative way, trying to extort approval, esteem, and material gain. When peaceful efforts fail, hostility may break through his defenses in physical violence.

"Women are reacted to similarly, unless they satisfy his needs for passivity, dependence and external narcissistic supply. Nurturant mother figures are initially accepted, and he is able to relate to them at an infantile level, but any non-satisfaction of demands may lead to an outbreak of hostility,

quite possibly in the form of acute psychosis and homicidal violence. [124]

“Diagnosis: The present personality structure is felt to have existed prior to the appearance of epilepsy, which, however, is an important psychological threat to this particular structure. The primary reaction tendencies seem to lie at an undetermined point on the conscious-unconscious continuum from psychopathy to hysteria, with compulsive tendencies supporting a precarious neurotic adjustment. Though not psychotic at present, the patient is felt to be extremely subject to acute psychotic break. Under stress, obsessive, compulsive tendencies are manifest in paranoid schizophrenia.

“Prognosis: Factors making for an unfavorable prognosis are the patient’s immaturity and lack of insight, the brittle control of hostility, and the fact that his intellectual ability is below his conscious self-evaluation and the expectancies others may have about him. He needs protection, support, and success in terms of money, sex, and assurances of power. He is very dependent on external sources of narcissistic supply. Without a protected environment and immediate gratification of needs, prognosis is very poor; with these, guarded.

“It is felt that the patient would have a fairly good prognosis for psychotherapy in a protected environment initially low on outside sources of narcissistic gratification. Under other circumstances he would probably not be amenable to psychotherapy.

“Summary: The patient’s narcissistic needs are [125] very extreme and combined with unconscious

fear of their frustration to support unacknowledged hostility and panic. Object relationships are infantile. He can relate to nurturant mother figures as long as the roles are unconscious. With others he interacts in an evasive and manipulative manner, involving third persons to do his manipulating whenever possible.

“He defends against hostility, dependency, feelings of inadequacy, and panic by suppression, repression, denial reaction formation, grandiosity, ego expansion, compulsivity and probably disassociation. If present, disassociation is very important in the total dynamics; but the possibility of interpreting the same behaviors as evidence of psychopathy cannot be overlooked.

“The patient is presently neurotic, with strong likelihood of recurrence of psychosis, manifested by interpersonal violence.

“Prognosis is poor. It is felt that the prognosis for psychotherapy would be reasonably good, but that he would be amendable to its initiation only in the absence of outside sources of narcissistic supply.

“Presented by: F. Crefts and R. Wirt.

“Approved by: Richard C. Hamister, Ph.D., Supervisor, Testing Section, Clinical Psychology Service.”

And that's the end of that particular report. And then we can have the Veterans Administration Hospital in Palo Alto, the report of hospitalization for insurance purposes, dated [126] December 28, 1950,

admitted into evidence, a report of the Veterans Administration Hospital of the United States.

The Court: That's Exhibit M for identification?

Mr. Fluharty: "N" as in "Nellie".

The Court: Oh, "N". What happened to "M"? Are you passing it?

Mr. Fluharty: I'm sorry, I got a little out of order.

The Court: Do you want to back up and take "M"?

Mr. Fluharty: Yes, please. I am sorry. We will pass Exhibit "M".

The Court: All right. Then come to "N", and that that Palo Alto Veterans Hospital Report on Examination for Insurance Purposes?

Mr. Fluharty: That's correct.

The Court: It may be received in evidence as——

The Clerk: Plaintiff's Exhibit N admitted into evidence.

(Report of hospitalization for insurance purposes marked Plaintiff's Exhibit N in evidence.)

Mr. Fluharty: The last paragraph of Exhibit N:

"As expected prognosis regarding future psychotic break is highly guarded. As regards his epilepsy, he at the present time has no seizures, however it is felt that this is due to his continuing passive living while in the hospital situation. It is noted by the patient that these seizures come and go directly related to his emotional tension, and it is felt these may recur as emotional tension becomes unbearable." [127]

Now, the next——

Mr. Perillat: If it please the Court, at this time I am going to ask Counsel to read the very next paragraph, which is the closing summary of this entire report, entitled "Diagnosis."

The Court: He may comply with your request if he wishes, otherwise you can read it.

Mr. Perillat: I'll read it, your Honor.

Mr. Fluharty: I'd rather, thank you. Now, your Honor——

Mr. Perillat: Excuse me. May I read it at this time, your Honor, to complete the thought trend, because it was part of the same report counsel was reading.

The Court: No, it's more orderly—do I understand you to say you decline to read it?

Mr. Fluharty: Well, sure, I'll read it.

"Diagnosis: (1) Epilepsy, idiopathic, grand mal, with psychotic reaction of agitated, confused type, chronic, mild, in complete remission, manifested by frequent epileptiform seizures, agitated combative impulsive behavior, irritability, paranoid trends, and periods of mental confusion. Seizures controlled. (2) Scarring and keloid formation, right anterior and post auricular areas, and pinna, residual burn. (3) Fracture, skull, basal, right, sustained in epileptic seizure November 10, 1949, history of.

"Status: Discharged December 22, 1950, Maximum Hospital Benefit. Was committed. Competent. Has no guardian. [128] Had full ground and pass privileges.

"Signed: R. S. Mowry, M.D., Medical Officer.

“J. T. Ferguson, M.D., Chief, continued treatment service.

“Approved: J. M. Wallner, M.D., Chief, Psychiatry.”

The Court: Very well.

Mr. Fluharty: Now, the next one, your Honor, of course, is a certificate to which arguments were given to the Court yesterday. At this time I offer into evidence this certificate which we argued about. It's Exhibit O for identification.

Mr. Perillat: If the Court please, before we move on to this, I have a motion regarding all of the prior testimony up to this point, which I should like to make at this time.

The Court: Very well. I will hold reacting to the offer of the Exhibit O for identification, and what is your motion?

Mr. Perillat: At this time, your Honor, we move to strike all of the testimony offered in the Exhibits A through N, the reading of which has been brought out into evidence, on the following basis: No. 1, that the final diagnosis of the evidence of plaintiffs impeaches all of the previous evidence. There is no evidence which lays a foundation to connect the epilepsy to any organic brain disease, and in the absence of such a connection there is no evidence whatsoever that following the discharge of this veteran on December 22, 1950, from the hospital, that he was incompetent. To the contrary, he was [129] discharged as competent, and on that basis I move to strike all the prior testimony on the basis that it has no connection whatsoever with an act performed by this veteran on April 21, 1950.

Mr. Fluharty: Your Honor, as already indicated in our opening arguments, we are attempting to show a trend. The fact that the veteran began with a blow on the head, suffered epilepsy, became increasingly severe, began having——

The Court: Well, I understand your theory. I don't think you should be arguing the motion in the presence of the Jury. I am going to deny the motion.

Now, as to Exhibit O for identification——

Mr. Fluharty: And with respect to that, your Honor, I have here, so that there is no mistake about the authenticity of Exhibit O being a County document, I have another document which is a similar document, but secured from a higher organization in our State Government, and I would like to have that marked as next in order for identification.

The Court: That will be marked O-1 for identification.

The Clerk: Plaintiff's Exhibit O-1 marked for identification.

(Certified copy of death certificate with attached authentication marked Plaintiff's Exhibit O-1.)

Mr. Fluharty: This document is a duly certified copy of the records of Public Health, State of California, and authenticated [130] by the Secretary of State of the State of California by the Seal of the State of California.

The Court: They really believe in big seals in this State, as well as big trees, big seals.

In view of our discussion at the pretrial confer-

ence, I will admit this document with one section deleted where it does not, I am advised, comply with the California State Law; namely, the word filled in this section on 29-A on the certificate.

Mr. Perillat: That is our only objection to that; it does not comply with the law. With that removed, we have no objection.

The Court: The Clerk will paste that over.

Mr. Fluharty: I might say that I am not stipulating to this, your Honor, because I talked to the Secretary of State this morning——

Mr. Perillat: To which I object as highly improper.

The Court: I didn't ask for any argument.

Mr. Fluharty: I am sorry.

The Court: Very well. The one with the great big pretty seal is more of an original than the marked Exhibit O for identification, so let's use Exhibit O-1 for identification, and that part there, paste something over it.

The Clerk: All right, sir.

The Court: The document thus restricted, [131] Exhibit O-1 for identification, may be received in evidence.

The Clerk: Plaintiff's Exhibit O-1 admitted into evidence.

(The document previously marked Plaintiff's Exhibit O-1 for identification was received in evidence.)

The Court: Fine. Like most Clerks, you are a jack of all trades.

Mr. Fluharty: Thank you.

This, ladies and gentlemen of the Jury, is a certificate from the State of California, Department of Public Health, in which Malcolm H. Merrill, M.D. certifies this is a true copy of the document filed in that Department's office, and it is entitled "Certificate of Death; date of death March 16, 1952, 8:05 A.M.

"Name of deceased, William Ellsworth Gardner."

Further down in the section it says: "Disease or condition directly leading to the death, Bronchopneumonia. Antecedent causes due to barbituate poisoning."

And it is signed by Ethal A. McKenzie, the local Registrar.

Next in order, your Honor, is Exhibit P, which is a letter from the Veterans Administration, signed by R. J. Hinton, Director, Dependents and Beneficiaries Claims Service, dated September the 20th, 1957, which is a certification as to the status of the beneficiary's record with respect to this particular insurance policy, and it has been admitted as genuine under the stipulation. [132]

Mr. Perillat: To which I object as incompetent, irrelevant and immaterial. There is no question about the status of the insurance in this case. That's a letter to Mr. Fluharty, your Honor.

Mr. Fluharty: It's a certification that is signed by Mr. Hinton which is an abstract of the records and which has been admitted to as genuine.

Mr. Perillat: It has no competency, materiality or relevancy in this proceeding, if it pleases the Court.

Mr. Fluharty: I believe this comes in as an abstract of Government records.

The Court: Objection is sustained. It's nothing but a letter to the attorney who is an interested party, but I understand there's no dispute but what the veteran's record shows the last designated beneficiary was in favor of Mr. Perillat's clients.

Mr. Perillat: That's true.

Mr. Fluharty: Yes, sir.

The Court: We are trying to prove the prior designation was Mr. and Mrs. Gardner. You can't do it by that letter.

Mr. Perillat: If the Court please, if it will assist counsel, I will stipulate the previously designated beneficiaries were Mr. and Mrs. Glaser and Mr. George R. Gardner.

Mr. Fluharty: I will accept that.

The Court: In view of that so-called stipulation, [133] as we lawyers call it, a stipulation is an agreement as to a fact which you may accept as evidence.

Mr. Perillat: If the Court please, may I ask counsel to show each of these documents to you that he is about to enter into evidence? I feel they are incompetent, irrelevant and immaterial.

The Court: Incidentally, did you both find the case I referred to you last night?

Mr. Perillat: The case of Judge Wigg?

The Court: Yes.

Mr. Perillat: Yes.

The Court: Fine. 226 Fed. 2nd, page 475, at 482. All right, this is a different type of document.

Mr. Perillat: An entirely different type of document. I have no objection as to a foundation on this except it is wholly immaterial and wholly irrelevant and not within the issues of the case.

The Court: I understand you to be making that objection unless you otherwise indicate as we go along?

Mr. Perillat: Yes, my request is the Court would examine these documents.

The Court: Let's have an offer, first, so I will have something to perform on.

Mr. Fluharty: Yes. The next documents which I offer, your Honor, are to show the marital status of the veteran and [134] the natural objects of his bounty, his family relationships, children, if any, brother and sister and mother, and I wish to show by this one document the fact of his marital status at the time.

Mr. Perillat: Well, if the Court please, that is not in issue here.

Mr. Fluharty: I think, since the test is set up in the Taylor case, your Honor, based on the natural objects of the bounty, I think we have to bring in who are the natural objects of the bounty.

The Court: You make an offer and I will rule on it.

Mr. Fluharty: Will you mark this as Plaintiff's Exhibit next in order for identification?

The Clerk: Plaintiff's Exhibit Q marked for identification.

The Court: May I see it after you mark it?

The Clerk: Yes, your Honor.

(Interlocutory judgment of divorce and final decree of Bonnie Lucille Gardner and William E. Gardner marked Plaintiff's Exhibit Q for identification.)

The Court: This is a certified copy of the divorce decree. For what purpose do you make an offer of this document?

Mr. Fluharty: To show that at the time of the designation of the beneficiary that the man was unmarried and that the [135] mother of the two children was no longer married to him.

Mr. Perillat: If the Court please, this very lady has filed a disclaimer of any interest in this proceeding.

The Court: The document is irrelevant to the issues here on trial. The objection is sustained.

Mr. Fluharty: All right. Would you kindly mark this as Plaintiff's Exhibit next in order for identification?

The Clerk: Plaintiff's Exhibit R marked for identification.

(Birth certificate of James Robert Gardner was marked Plaintiff's Exhibit R for identification.)

Mr. Perillat: My same objection to this one.

The Court: This is a birth certificate. For what purpose is it offered?

Mr. Fluharty: To show the decedent had children and that they are natural objects of his bounty, your Honor.

Mr. Perillat: If the Court please, it is a stipu-

lated fact by the pleadings there is children of this marriage. The mother has filed a disclaimer.

The Court: For herself.

Mr. Perillat: For herself.

The Court: But you agreed at the time, and do you stipulate that at the time of the designation in question, April 30, 1951, the veteran had two children living?

Mr. Perillat: I stipulate to that, your Honor.

The Court: Do you accept it? [136]

Mr. Perillat: Accept the stipulation.

The Court: Very well, in view of that, the document is superfluous, and that, too, is a fact the jury may consider as being in evidence, that the veteran at the time of the designation of beneficiary here in dispute had living two children by his first marriage.

Mr. Fluharty: There's one other——

The Court: The two children being minors.

Mr. Fluharty: I was thinking the age was material, the date of birth.

The Court: I have no objection to it.

Mr. Perillat: Minor children, I have no objection.

Mr. Fluharty: All right. Well, then, would you stipulate to the birth dates?

Mr. Perillat: Well, the birth dates would be on those birth certificates. Read them, if you wish. Subject to the Court's——

The Court: Yes.

Mr. Fluharty: All right. One of the minor children was born on July 2, 1941.

The Clerk: Do you want that marked for identification?

The Court: No.

Mr. Fluharty: And the other one, may I have it please?

The Court: This is part of the stipulation? [137]

Mr. Fluharty: Yes, your Honor.

The Court: And the other child was born?

Mr. Fluharty: On May 6, 1946.

The Court: Very well. That is agreed to, ladies and gentlemen of the jury, and you may accept that as a fact. And from those dates, of course, you may calculate the age of the children as of the date of the designation of the beneficiary in dispute, which was April 30, 1951.

Mr. Fluharty: Mark this Plaintiff's next in order for identification, please.

The Clerk: Plaintiff's Exhibit S marked for identification.

(Judgment of mental illness was marked Plaintiff's Exhibit S for identification.)

The Court: Yes.

Mr. Perillat: That being the matter your Honor has already received in evidence, I will not renew my objection.

The Court: Very well. "S" will be received, it being a judgment of the Superior Court of California.

The Court: Plaintiff's Exhibit S admitted into evidence.

(The document marked Plaintiff's Exhibit S for identification was received in evidence.)

Mr. Fluharty: Ladies and gentlemen of the jury, this is a duly certified, authenticated copy of order issued by the Superior Court of the State of California, in and for the [138] County of Sacramento, on a proceeding No. 8974. It's entitled The People for the Best Interest and Protection of William E. Gardner, Jr., as a Mentally Ill Person, Respondent; and it's entitled, "Judgment of Mental Illness and Order for Care, Hospitalization or Commitment." It was filed October 10, 1950. Stamped "C. C. La Rue, Clerk, by Franch, Deputy." It recites in the pertinent divisions as follows:

"On this 10th day of October, 1950, William E. Gardner, Jr., a person alleged to be mentally ill, was brought before me in open court for a hearing and examination on an allegation of mental illness, and there having been presented to me the Petition of Leslie Cox, alleging that William E. Gardner, Jr., is mentally ill, and an Order of Detention issued thereon by a Judge of the Superior Court of this County, and a return of the said Order;

"And it further appearing that the provisions of Article 3 of Chapter 1, Part 1, Division 6 of the Welfare and Institutions Code have been complied with;

"And it further appearing that Dr. E. M. Wilder and Dr. B. F. Howard, two regularly appointed and qualified Medical Examiners of this County, have made a personal examination of the alleged

mentally ill person, and have made and signed the certificate of the Medical Examiners, which certificate is attached hereto and made a part hereof.

“Now, therefore, after examination and certificate made as aforesaid the Court is satisfied and believes that William E. Gardner, Jr., is of such mental condition that he is in need of supervision, treatment, care or restraint.

“It is ordered, adjudged, and decreed that William E. Gardner, Jr., is a mentally ill person, and that he be committed to a facility of the Veterans Administration or other agency of the United States, to-wit: Veterans’ Hospital at Palo Alto, in accordance with the provisions of Section 1663 of the Probate Code of the State of California.

“It is further ordered and directed that the Sheriff of this County take, convey, and deliver William E. Gardner, Jr. to the proper authorities of the hospital or institution designated herein, to be cared for as provided by law.

“Dated this 10th day of October, 1950.

“J. L. Henry,

“Judge of the Superior Court.”

Certified by the County Clerk of the County of Sacramento as follows:

“State of California,

“County of Sacramento—ss.

“I, C. C. LaRue, County Clerk and Ex Officio

Clerk [140] of the Superior Court of the County of Sacramento, do hereby certify the foregoing to be a full, true and correct copy of the original Petition, Order for Detention, Certificate of Medical Examiners, and Order of Commitment on file in my office.

“In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court, this 10th day of October, 1950.

“C. C. LaRue, County Clerk,
“By Franch, Deputy.”

Now, your Honor—would you mark this Plaintiff’s next in order for identification?

The Clerk: Plaintiff’s Exhibit T marked for identification.

(Certificate of County Clerk of County of Sacramento, was marked Plaintiff’s Exhibit T for identification.)

Mr. Fluharty: This certificate yesterday, your Honor, was argued, and you indicated you would not allow it, but I wish to offer it as a formal offer.

Mr. Perillat: To which I renew my same objection.

The Court: What is this thing?

Mr. Fluharty: This is the certificate——

The Court: I see. Yes, I will decline to accept this in evidence for your own evidence shows it is superfluous and unnecessary. [141]

Mr. Fluharty: Thank you, your Honor.

I now call Mr. George Robert Gardner.

GEORGE ROBERT GARDNER

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

The Court: Will you please state your name?

The Witness: George Robert Gardner.

The Court: Age?

The Witness: 32.

The Court:: Residence?

The Witness: Sacramento, California.

The Court: Occupation?

The Witness: Teacher.

The Court: Where?

The Witness: Sacramento State College.

The Court: And are you a citizen of the United States of America?

The Witness: Yes, I am.

The Court: Exclusively?

The Witness: Yes.

The Court: All right. Take the witness.

Mr. Fluharty: Thank you, your Honor.

Direct Examination

Q. (By Mr. Fluharty): Your name is George Robert Gardner? A. Yes.

Q. You are one of the Plaintiffs herein? [142]

A. Yes.

Q. And you are related to the decedent?

A. Yes.

Q. And what is your relationship, sir?

A. Brother.

Q. You are the brother? A. Yes.

Q. Are you aware of the nature and extent of his family?

(Testimony of George Robert Gardner.)

Mr. Perillat: To which I object. It's incompetent, irrelevant and immaterial. It's already been proved.

Mr. Fluharty: I think, your Honor——

The Court: What's the purpose?

Mr. Fluharty: To show the nature and extent and object of his bounty.

The Court: This is on the theory you indicated yesterday that you thought was applicable?

Mr. Fluharty: Your Honor, at this time I would like to make a formal offer of proof, because this will be throughout——

The Court: All right. I will excuse the jury when I hear the offer of proof. Will you step into the jury room just temporarily, please? If it's something I think you should hear I'll call you back.

(Whereupon the jury retired from the court room.)

The Court: The jury is now absent.

Mr. Fluharty: Your Honor, at this time, [143] yesterday I asked to have presented this letter of September 14 for the purpose of showing a constructive trust and it was denied. Of course, I am——

The Court: Now, wait just a minute. Maybe you better make your offer here to protect your record and get a ruling during the course of the trial. I have noted the jury is absent. You can do it now. This offer of proof I understood you to be making was with respect to what this witness will prove.

Mr. Fluharty: He will prove the signature.

(Testimony of George Robert Gardner.)

The Court: Oh, all right. I didn't understand.

Mr. Perillat: If I may interrupt the Court.

The Court: Yes.

Mr. Perillat: Do I understand for the purpose of the record we will go through as far as this specific objection is concerned? We argued this at length yesterday, this business of constructive trust and it was my understanding it was part of the pre-trial order made in reference to this.

The Court: It's controlling even though I will not tolerate any extensive argument of it. He may protect the record to make an offer.

Mr. Fluharty: Yesterday, in the Complaint we have one of the causes based on a constructive trust theory because of the letter that was written contemporaneously with the execution of September 14, 1950, beneficiary addressed to the witness, Mr. Gardner, and to the sister asking them to hold the [144] proceeds of the insurance for his children. It was our understanding a constructive trust arose. We were overruled by the Court. I might say I will ask for those instructions in order to protect my record.

Now, it is my theory, I have this letter of September 14 plus a series of letters written either to the mother or to the aunt or to the brother indicating the deep and abiding and great concern for the welfare of his children.

The Court: Well, now, wait. You are talking generally. You got a witness on the stand who said—you asked him something about the veteran's

(Testimony of George Robert Gardner.)

family, I think is the way you worded it, and there was an objection it was irrelevant, and you made an offer of proof in regard to what this man says.

Mr. Fluharty: I'll make an offer of proof as to each point. Is that all right?

The Court: All right.

Mr. Fluharty: The first point——

The Court: You offer to prove by this witness that——

Mr. Fluharty: That he has certain members of his family.

The Court: It's agreed he had a mother, he had a father, he had one wife, and he had two children, and then he had no wife, then he had a wife. What else do you need? And he's got a brother and sister who are Plaintiffs.

Mr. Fluharty: That's right. All right. [145]

The Court: What more can you prove?

Mr. Fluharty: It was merely preliminary, your Honor. I'm sorry. I don't want to take the Court's time. It's merely preliminary.

The Court: I know what you are getting at, but you may not be at it, at the point here.

Mr. Fluharty: It was a preliminary question. I intended to go on after that and then go into this other material which I now make the form of my offer, ask if he knew the members of the family, and his knowledge toward them, and his affection toward them, and then I was going to go into this other material.

The Court: Well, then, secondly, through this

(Testimony of George Robert Gardner.)

witness, you offer to prove, and I take it there will objection to it also, that he had certain affections for certain members of the family and demonstrated it by certain letters?

Mr. Fluharty: That's correct, your Honor.

The Court: All in the theory, as you indicated yesterday, that, although this is a contract, it is governed by some California law——

Mr. Fluharty: No, your Honor. I intend to bring it in on the theory of intent—or under the theory of intent to make a new will. I have cases on this. That the intent of the testator or the maker of the contract, or of a deed, the declarations made before at and after the time are all admissible in order to show the intent at the time of the making of this [146] particular act. Now, there are a number of cases on this, and all of them agree that it's true that they are hearsay, but they don't come in for the truth or falsity of the statement. They come in for the purpose of showing the state of mind of the declared.

The Court: When?

Mr. Fluharty: They come in when they are offered, which is now.

The Court: The only state of mind we might possibly be interested in, and definitely are interested in, is April 30, 1951.

Mr. Fluharty: That's right. Now, in order to show the state of mind on April the 30th, 1951, according to the cases, you can bring in declarations made before, at the time, and afterward, in

(Testimony of George Robert Gardner.)

order to create the surrounding state of mind. As I understand it from reading the cases that it is hearsay, but it comes in as an exception to the hearsay rule because you are not bringing them in for the truth or falsity, but only to show the state of mind.

The Court: I think we are ahead of ourselves here. Let's stop because we are anticipating things. Call the jury back, please.

(Whereupon the jury returned to the court room.)

The Court: The jury is now present. The record may so show. [147]

The question put to the witness called for him to tell of the decedent's family. I forget the exact wording of it. Do you have it, Mr. Reporter?

(Question read.)

The Court: Rephrase the question.

Mr. Fluharty: Yes, your Honor.

The Court: And don't answer it for a moment because there will be an objection, I gather. Go ahead.

Q. (By Mr. Fluharty): Were you a member of the family circle of the decedent here?

Mr. Perillat: To which I object on the basis it is incompetent, irrelevant and immaterial. He's the uncle. There is no issue raised on that point in this case.

The Court: Sustained.

Mr. Fluharty: All right.

Q. Calling your attention to the day of approxi-

(Testimony of George Robert Gardner.)

mately, on or about September the 9th of 1950, did you have occasion to see the decedent?

A. Yes, I did.

The Court: Excuse me. Let me get that date again?

Mr. Fluharty: September the 9th, 1950.

Q. When did you see him?

A. I saw him just after he arrived at the airport in the morning I picked him up, took him over to see his boys.

Q. Do you recall what date that was?

A. September 9th. [148]

Q. And the day of the week?

A. Saturday.

Q. And it was the Municipal Airport in Sacramento? A. Yes, it was.

Q. Was there any other person with you?

A. My sister.

Q. The Plaintiff herein? A. Yes.

Q. Mrs. Glaser. About what time on Saturday morning was that?

A. I think it was about noon.

Q. And you picked him up at the airport. Now, where did you go?

A. We went to my aunt's house where his boys were staying.

Q. And how long did he stay there?

A. Well, several hours, and then we took him over to our home with the boys, and we took him back to the airport in the evening.

Q. Now, during the course of the day, then, you

(Testimony of George Robert Gardner.)

had occasion to go to your house, you and your sister, the decedent and the two boys, is that correct? A. Yes.

Q. Now, while you were at your house, did you have occasion to have conversation? A. Yes.

Q. With the decedent? A. Yes. [149]

Q. And did he make any statements to you with respect to his insurance policy?

Mr. Perillat: To which I object on the basis of its incompetency, irrelevancy, and immateriality. The decedent's executed designation of a policy is the best evidence thereof, and further this is hearsay.

The Court: Sustained.

Q. (By Mr. Fluharty): Did he make any statements to you with respect as to whether you should take care of his children?

Mr. Perillat: To which I object on the basis it's incompetent, irrelevant, and immaterial.

The Court: Sustained.

Q. (By Mr. Fluharty): This was on September the 9th. Did you have occasion to observe his mental state at that time?

Mr. Perillat: To which I object on the basis it calls for a conclusion of this witness, your Honor.

Mr. Fluharty: Your Honor, I offer this as an opinion of a lay witness, mental status is considered—my understanding it is considered admissible of people who have been long in contact with each other, members of the family.

Mr. Perillat: That's the basis of my objection,

(Testimony of George Robert Gardner.)

if I may be heard. There's no showing of a continued observation, and I believe the statute in California requires they be intimately acquainted [150] for a long period of time.

The Court: Sustained.

Mr. Fluharty: Will you mark this as Plaintiff's Exhibit next in order for identification?

The Clerk: That's Plaintiff's Exhibit U marked for identification.

(Letter from decedent was marked Plaintiff's Exhibit U for identification.)

Mr. Fluharty: At this time, your Honor, I wish to offer this into evidence based on the offer of proof which was made before. I would like to lay a foundation, if necessary.

Mr. Perillat: I don't know what that is, your Honor, so I cannot—may I approach the Bench?

Mr. Fluharty: This is the one set out in the Complaint.

Mr. Perillat: My objection is made to this.

The Court: You better make it now.

Mr. Perillat: We object to this letter on the basis it is incompetent, irrelevant, and immaterial. It is not within the scope of any issues framed by the pleadings in this case.

The Court: Sustained.

Mr. Fluharty: All right. All right, that's all of this witness. Thank you, Mr. Gardner. You may cross examine.

Mr. Perillat: No cross examination, Mr. Gardner. Thank you.

The Court: You are excused. Next witness. [151]

Mr. Fluharty: Next witness, your Honor, will be the sister, the same line of information is offered and——

The Court: You do what you want, and I'll make my rulings.

Mr. Fluharty: All right. Mrs. Glaser, please.

HELEN GLASER

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

The Court: May we have your name, please?

The Witness: Mrs. Helen Glaser.

The Court: You are one of the Plaintiffs in this case?

The Witness: Yes, I am.

The Court: Speak good and loud, please.

The Witness: Yes.

The Court: You may either tell me your age, or you are over 21.

The Witness: I am 35.

The Court: Housewife?

The Witness: Yes, mother.

The Court: And where do you live?

The Witness: In Sacramento.

The Court: Are you a citizen of the United States of America?

The Witness: Yes, I am.

The Court: Only? [152]

The Witness: Yes.

The Court: All right. Take the witness.

(Testimony of Helen Glaser.)

Direct Examination

Q. (By Mr. Fluharty): Your name, please?

A. Helen Glaser.

Q. Are you related to the decedent?

A. Yes, I am, I am his sister.

Mr. Fluharty: May I lay a foundation with respect to this letter?

The Court: You proceed on whatever you want to do, and I'll make my rulings.

Mr. Fluharty: All right.

Q. I show you Plaintiff's Exhibit U for identification and ask you if you have ever seen this before? A. Yes, I have.

Q. And do you recognize the signature?

A. Yes, my brother Bill's signature. The letter in my brother's handwriting.

Q. And you are familiar with his handwriting?

A. Yes, I am.

Q. And you received this letter?

A. Yes, my brother and I did.

Q. And you received it in Sacramento?

A. Yes.

Q. At or about September 14, 1950? [153]

A. Yes.

Mr. Fluharty: At this time, your Honor, I wish to offer this in evidence once again.

Mr. Perillat: To which I object——

The Court: I didn't hear.

Mr. Fluharty: I offer into evidence Plaintiff's Exhibit U for all purposes.

Mr. Perillat: To which I object on the basis it's

(Testimony of Helen Glaser.)

incompetent, irrelevant, and immaterial. It does not fall within the issues framed within the pleadings in this case.

The Court: Sustained.

Q. (By Mr. Fluharty): Calling your attention to September the 9th, 1950, did you have occasion to see the decedent? A. Yes, I did.

Q. And when did you see him on that day?

A. I was with my brother when we picked him up and took him over to——

Q. That was on Saturday morning, is that correct?

A. Yes, Saturday morning, and during the day, Saturday, I was with him.

Q. And you had the children with you, his two children? A. Yes.

Q. And you took them to your home?

A. Yes.

Q. Now, during the course of the day, did you have occasion to have conversations with Mr. Gardner? A. Yes, we did, we talked—— [154]

Mr. Perillat: Excuse me. Object to the witness volunteering an answer, if the Court please.

The Court: She was asked if she had conversations with the decedent. All you need to do is answer the questions as asked. Don't go on. However, there has been no damage done, but don't relate the conversation if you are asked to unless there is no objection.

The Witness: All right. Thank you.

Q. (By Mr. Fluharty): During the course of

(Testimony of Helen Glaser.)

the day, did you have a conversation with the decedent? A. Yes.

Q. And who was present besides yourself?

A. Well, my brother when we talked to him.

Q. You had one conversation then when your brother was present? A. Yes.

Q. Was anyone else present?

A. Not at this time, no.

Q. And where was the conversation held?

A. At 815 - 28th Street.

Q. You were in a room by yourselves?

A. Yes.

Q. Now, what was the subject of the conversation?

Mr. Perillat: To which I object on the basis it's incompetent, irrelevant and immaterial. [155]

The Court: Not until I know what the subject was. Proceed. You may answer, just the subject.

The Witness: What was that question?

The Court: What was the subject of the conversation?

The Witness: The children, his love for the children, and the——

Mr. Perillat: To which I object.

The Court: Wait, wait. Let her finish. And what?

The Witness: He spoke of us taking——

The Court: No, just asked for the subject of the conversation.

The Witness: He spoke of leaving his insurance money to the children, and he wanted us to see that we could give—help take care of the children.

(Testimony of Helen Glaser.)

Mr. Perillat: To which I object on the basis it is incompetent, irrelevant and immaterial, and move the Court to strike the entire answer.

The Court: It may go out. The jury is instructed to disregard it. It does not relate to any of the issues framed by the pleadings here.

Q. (By Mr. Fluharty): Did you have an opportunity to observe his demeanor, his mental state at that time? A. Yes, I had.

Q. What was his mental state? Don't answer until——

Mr. Perillat: I renew my objection. It calls for [156] a conclusion of the witness which I believe she can only testify to the facts she observed, and not the conclusion she may have drawn from those facts; and, furthermore, if these facts are offered to show competency or incompetency, there's no foundation laid as required by the statutes of evidence in California.

The Court: Sustained.

Mr. Fluharty: All right.

Q. On the day in question was he irrational?

A. No.

Mr. Perillat: To which I object. It is a conclusion of the witness.

The Court: Sustained. The answer may go out.

Mr. Fluharty: All right. That's all. You may cross examine.

Mr. Perillat: No cross examination.

The Court: You are excused. Next witness.

Mr. Fluharty: Mrs. Gardner.

(Addressing Clerk) Will you mark these two as Plaintiff's next in order for identification, please?

LELIA G. GARDNER

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

Q. (By the Court): Will you please state your name?

The Witness: Lelia G. Gardner.

The Court: And you may either tell us your age or—— [157]

The Witness: I am 64 years old.

The Court: Where do you live?

The Witness: 2618 X Street, Sacramento.

The Court: And are you a housewife?

The Witness: Yes.

The Court: You are not employed, in other words?

The Witness: Well, I have a little business of my own.

The Court: What is your occupation?

The Witness: It's a six-bed combo convalescent home.

The Court: And are you a citizen of the United States of America?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: All right. Take the witness.

The Clerk: Plaintiff's Exhibits V and W marked for identification.

The Court: V and W for identification.

(Two photographs of decedent were marked

(Testimony of Lelia G. Gardner.)

respectively Plaintiff's Exhibits V and W for identification.)

Mr. Perillat: To which I object on the basis they are incompetent, irrelevant and immaterial, and do not tend to prove any issues raised in the case.

The Court: I haven't heard they were offered.

Mr. Perillat: Excuse me, your Honor. [158]

Mr. Fluharty: I haven't offered these yet, counsel.

Mr. Perillat: I beg your pardon.

Q. (By Mr. Fluharty): I show you Plaintiff's Exhibit No. V for identification, and ask you if you have seen this before?

A. Yes, I have. That's William.

Q. That's picture of William?

A. Yes, at the time of his graduation.

Q. And when was that?

A. Well, it was about '41—no, wait a minute. Now, I don't know. I just don't remember. '42, I guess it was, in Ft. Monmouth, '42.

Mr. Perillat: Excuse me. I object to even the foundation on these on the basis they do not tend to prove any issue in this case, your Honor.

The Court: What is the purpose?

Mr. Fluharty: It's for the purpose of acquainting the jury with the deceased, your Honor, show the surrounding circumstances of this whole case.

The Court: All they need to know is there was such a person who did live, who did have insurance, who made certain designations of beneficiary, good,

(Testimony of Lelia G. Gardner.)

bad, or indifferent, not being the issue, and that he died. It may look very interesting, but it doesn't help us decide any of the issues.

Mr. Perillat: It doesn't help us decide what happened on April 30, 1951.

The Court: Sustained.

Mr. Fluharty: May I offer these and have them denied?

The Court: Surely. [159]

Mr. Fluharty: I offer those in evidence for all purposes.

The Court: V and W for identification—the objection voiced to V is renewed as to W?

Mr. Perillat: It is, your Honor.

The Court: Same ruling as to both. Interesting as they may be, the pictures do not help us solve the issue here on trial.

Mr. Fluharty: If you will mark those next in order for identification, please.

The Clerk: That's Plaintiff's Exhibit X marked for identification. There is some loose photographs in here also, counsel.

Mr. Fluharty: Well, I was going to say, each one of them.

Mr. Perillat: The Court please, what is coming up is merely more repetition of the same thing.

The Court: Well, that may be. There's nothing before me.

Mr. Fluharty: Your Honor, I am getting my case taken away from me. I think counsel should be instructed to stay at the table.

(Testimony of Lelia G. Gardner.)

The Court: I don't know what your rules and regulations are, but, certainly, when he has need to voice an objection, he has to stand.

The Clerk: Plaintiff's Exhibits X, Y, Z, and AA, marked for identification. [160]

(The four photographs referred to were marked respectively Plaintiff's Exhibits X, Y, Z and AA, for identification.)

The Court: However, I will ask Mr. Perillat not to anticipate.

Mr. Perillat: My trouble here, the witnesses have been identifying and answering these questions before I have an opportunity to make my objection.

The Court: All right. That was possibly true of the last witness, but not this one. Proceed.

Mr. Fluharty: Thank you, your Honor.

Q. I show you Plaintiff's Exhibit X for identification and ask you if you have seen this before?

A. Yes, I have.

Q. And what is it? A. That's William.

Mr. Perillat: To which I object. It's incompetent, irrelevant, and immaterial, does not tend to prove any issue in this case.

The Court: It being another picture of the veteran?

Mr. Perillat: No, your Honor.

Mr. Fluharty: No, your Honor. It's not. It's a picture of one of the children. This comes in to show the objects of his bounty.

The Court: The objection is sustained. [161]

Mr. Fluharty: All right. May I offer then, into

(Testimony of Lelia G. Gardner.)

evidence for all purposes—or should I lay a foundation as to each or—they are all the same, but I want to make the offer, your Honor.

Mr. Perillat: I will stipulate, if it will help your Honor, the foundation has been laid, but renew my objection to their admissibility.

The Court: All right. And you are offering them?

Mr. Fluharty: Yes, your Honor, Plaintiff's Exhibit X, Y, Z and AA.

The Court: They all being photographs of the veteran's children?

Mr. Fluharty: Veteran's children and one of them is a picture of the veteran and one of the children, and another one the veteran and his wife and one of the children, and the other another child.

The Court: They do not help us solve any of the issues in this case; and, therefore, the objection is good as to each. No question but what he does have two children or did have two children and a wife, No. 1.

Mr. Fluharty: Your Honor, I have here a sheaf of correspondence that I would like to offer into evidence, and I think counsel would like to look at it; possibly we could take our afternoon recess while he goes over them.

The Court: All right. We will take our afternoon recess.

(Recess.) [162]

The Court: Note the presence of the jury. You may continue.

(Testimony of Lelia G. Gardner.)

Mr. Fluharty: Plaintiff's next in order for identification.

The Clerk: That will be Plaintiff's Exhibit AB, marked for identification.

(Letter to mother of decedent from decedent was marked Plaintiff's Exhibit AB for identification.)

Q. (By Mr. Fluharty): Mrs. Gardner, I show you what purports to be a letter dated January 5, 1948, written from the Biltmore Hotel, Los Angeles, to "Dear Mom," signed "I love you, Bill." Do you know this document?

A. Yes, it's William's handwriting.

Q. That's his signature at the bottom?

A. Yes, that's his signature.

Q. And the letter was addressed to you, was it?

A. Yes.

Q. Did you receive it? A. Yes, I did.

Mr. Fluharty: I offer this, your Honor, into evidence as Plaintiff's Exhibit AB for all purposes.

Mr. Perillat: To which I object on the basis it's incompetent, irrelevant, and immaterial. There's no foundation laid that it proves any issues involved in this action.

Mr. Fluharty: Once again, your Honor, we are offering these [163] letters to show the intent, state of mind of the decedent with respect to the natural objects of his bounty. Cases hold, and I have given the series of cases to your law clerk, with respect to this point that conditions before and at the time of the act and statements, declarations, although

(Testimony of Lelia G. Gardner.)

they are hearsay, do not come in for the truth or falsity, and that's the reason we are offering these documents.

Mr. Perillat: If the Court please, it is not the contention of this defense to urge this man did not love his mother, his brother, his sister, or anybody else, but I still maintain that this letter does not prove any issue in this case.

The Court: Sustained.

Q. (By Mr. Fluharty): I show you another letter, Mrs. Gardner, what purports to be a letter dated July 23, 1948, addressed to "Hello Mom and Helen."

The Court: Was this marked for identification?

Mr. Fluharty: I am sorry, your Honor.

The Clerk: Plaintiff's Exhibit AC marked for identification.

(Letter from decedent to his mother and a Helen, marked Plaintiff's Exhibit AC for identification.)

The Court: In the interest of time, do you have a series of these letters all for the same purpose and same effect, all written to this lady?

Mr. Fluharty: Not all written to her, no, some of them to other members of the family, but I can get all of hers and separate them, if that is all right. [164]

The Court: Yes, because my ruling is going to be obviously the same to all of them.

Mr. Fluharty: All right. All of these are for the same purpose under the same offer.

(Testimony of Lelia G. Gardner.)

The Court: Very well. Mr. Clerk, you will mark them AC for identification.

The Clerk: AC has been already marked, your Honor. Plaintiff's AD for identification. Plaintiff's AE marked for identification, and Plaintiff's Exhibit AF is marked for identification.

(Three letters from decedent to his mother were marked respectively Plaintiff's Exhibits AD, AE and AF for identification.)

The Court: Very well. They are all offered in evidence for the same purpose heretofore indicated with respect to, and at the time Exhibit A was offered.

Mr. Fluharty: That's correct. Do you want me to authenticate——

Mr. Perillat: I'll stipulate to that and——

The Court: Your objection is the same?

Mr. Perillat: Yes.

The Court: Sustained to each.

Mr. Fluharty: Mark these next in order.

The Clerk: Plaintiff's AG marked for identification.

(Letter from decedent to his children marked Plaintiff's Exhibit AG for identification.)

Q. (By Mr. Fluharty): Mrs. Gardner, I show you a communication with the heading—it's Plaintiff's AG for identification, which purports to be a letter with the notation "P. O. Box 511, Santa Barbara, California, July 20, 1951," addressed to "Dear Billy and Jimmy." A. Yes.

(Testimony of Lelia G. Gardner.)

Q. It's signed "Your daddy loves you, Daddy." Do you recognize?

A. That's William's handwriting, yes.

Q. You are familiar with his handwriting, is that correct?

A. Yes, I have many letters from him.

Mr. Fluharty: Thank you. Your Honor, at this time I wish to offer into evidence the letter of July 20, 1951 in the handwriting of the decedent addressed to "Dear Billy and Jimmy", and for the same purpose showing the fact of the state of mind with respect to the natural objects of his bounty.

Mr. Perillat: To which I object as being incompetent, irrelevant, and immaterial, and not within the scope of this action. There is no issue as to whether or not this man loved his children, mother or sister.

The Court: Sustained.

The Clerk: Plaintiff's Exhibit AH marked for identification.

(Letter from decedent to Marie and Ken, marked Plaintiff's Exhibit AH for identification.) [166]

Q. (By Mr. Fluharty): Mrs. Gardner, I show you what purports to be a letter marked Plaintiff's Exhibit AH for identification which at the head states "P. O. Box 511, Santa Barbara, California," dated July 20, 1951, addressed to "Dear Marie and Ken," and signed "Yours truly, William E. Gardner."

I ask you if you have seen this before?

(Testimony of Lelia G. Gardner.)

A. Yes, that's a letter written to my sister, and she had his children at the time.

Q. And whose signature is this?

A. That's William's signature.

Q. That's the decedent? A. Yes.

Q. And you furnished me with this letter, is that correct? A. I think I did, yes.

Mr. Fluharty: At this time, your Honor, I offer into evidence Plaintiff's Exhibit AH for identification for all purposes, and I offer it into evidence for the purpose of showing that he had great affection and love for his children, the natural objects of his bounty, to show a state of mind at or near the time of the execution of the change of beneficiary.

Mr. Perillat: To which I object as being incompetent, irrelevant and immaterial. It does not prove any issues in this case. Also merely goes to show he also loved his aunt and uncle.

Mr. Fluharty: I didn't say that. [167]

The Court: I understood it was a letter to the aunt concerning the children.

Mr. Fluharty: That is right.

The Court: But it is not in issue in this case. The objection is sustained.

Mr. Fluharty: Thank you.

The Clerk: Plaintiff's Exhibit AI marked for identification.

(Document entitled "My last will and testament" of decedent, marked Plaintiff's Exhibit AI for identification.)

(Testimony of Lelia G. Gardner.)

Q. (By Mr. Fluharty): Mrs. Gardner, I show you Plaintiff's Exhibit AI for identification which bears the designation, "Sacramento, California, December 3, 1949," and heading is "My last will and testament", and the end is "Sincerely, William E. Gardner, Jr.," and ask you if you have seen this document? A. Yes, I have. He asked me——

Q. What is this document?

A. It is his——

The Court: Just a minute.

Mr. Perillat: To which I object to that question specifically on the basis that it calls for a conclusion of this witness. The document has not been proved to be a last will and testament by a court with proper jurisdiction.

The Court: The witness may answer, if she knows; and, if she [168] is going to use legal terms, unless that document has been probated as a will, you will have to say it is a purported will.

The Witness: That's what I would say; it is a purported will.

Mr. Fluharty: All right. Thank you. Your Honor, I offer this into evidence for all purposes, the offer being it shows once again the state of mind of the decedent prior to the execution of these changes of beneficiaries. There is no better way of finding the state of mind than by will, and I offer this in evidence for this purpose.

Mr. Perillat: To which I object; incompetent, irrelevant, does not prove any issue in this case.

(Testimony of Lelia G. Gardner.)

Does not prove a probate by a proper jurisdiction, and I wonder why it hasn't been.

The Court: Objection sustained.

Mr. Fluharty: Thank you, your Honor. I move the last statement of counsel be stricken. It is argumentative.

The Court: It may go out.

Q. (By Mr. Fluharty): Mrs. Gardner, you are the mother of the decedent, is that correct?

A. Yes.

Q. Referring your attention to September 9, 1950, did he visit you in Sacramento?

A. Yes, he visited me, my son George brought him there. He went to the Air Depot to pick him up.

Q. He visited you in your home, is that correct?

A. Well, for a short time between the period of visiting with my sister and going over to George's home.

Q. Approximately what time of the day was this, Mrs. Gardner?

A. Well, it was some time in the afternoon. I got a phone call from William between 11:00 and 12:00, saying he was at the air depot, airport, and I phoned George and had him go pick William up.

Q. Now, at the time you saw him were there other persons present?

A. Well, George and Helen were in the house, but I don't know if they heard anything we said.

Q. Then there was just the two of you——

A. Beg pardon?

(Testimony of Lelia G. Gardner.)

Q. The two of you were immediately present together there, is that correct?

A. Well, yes, we were together.

Q. And you had a personal conversation, is that correct?

A. Well, yes, in regards to the children.

Mr. Perillat: To which I object, your Honor——

Mr. Fluharty: Merely a foundation.

The Court: I can only hear one person at a time. Go ahead. You object to what?

Mr. Perillat: I object to the witness volunteering an answer and ask the last statement of the witness be stricken as non-responsive to the question. [170]

The Court: She had only gone to the point the conversation was about the children. That may stand.

Q. (By Mr. Fluharty): You had a conversation about the children then at this time, that place, and you and your son were present, is that correct?

A. Yes, he was concerned about his health.

The Court: Just answer the question.

Q. (By Mr. Fluharty): All right. Now, what was the conversation that took place?

Mr. Perillat: To which I object on the grounds it's incompetent, irrelevant, and immaterial, does not tend to prove any issue in this case.

The Court: Sustained.

Mr. Fluharty: Once again I would like to renew my offer, your Honor. This is coming in to show the state of mind of the decedent with respect to

(Testimony of Lelia G. Gardner.)

the natural objects of his bounty. It is not for hearsay, but merely for the purpose of showing the state of mind.

The Court: I understand.

Mr. Fluharty: Thank you, your Honor.

The Court: Ruling stands. As a matter of fact, other than those facts you are tending to prove, judicial notice could be taken, so there's no use wasting a great deal of time on them anyway.

Q. (By Mr. Fluharty): You recall, Mrs. Gardner, during the [171] course of reading excerpts from the medical record of the decedent, there was reference made in the Fort Miley report to the fact members of the family had removed him from the hospital against the advice of the hospital?

A. We didn't know—I didn't know that he was ill at the time he was in Fort Monmouth.

The Court: Just a minute. Please wait for a question. They haven't asked you a thing. The lawyer just talked. Just wait for the question.

Q. (My Mr. Fluharty): Now, did you remove Mr. Gardner from the hospital?

Mr. Perillat: To which I object on the basis it is incompetent, irrelevant, and immaterial, and does not tend to prove any issue in this case.

The Court: Sustained.

Q. (By Mr. Fluharty): Now, referring your attention to the 21st of November, 1949, did you see your son, Mr. Gardner?

A. 21st of November?

Q. I think for recollection purposes, about three

(Testimony of Lelia G. Gardner.)

days after his discharge from the hospital on the 18th of November.

The Court: 1949?

Mr. Fluharty: 1949, yes.

A. Yes.

Q. (By Mr. Fluharty): Now, did you see your son, Mr. Gardner, on that day? [172]

A. Yes.

Q. And where did you see him?

A. Well, he was in my home. I had brought him home from the Letterman Hospital.

Q. You brought him home? A. Yes.

Q. Did you bring him in the car or by train?

A. I brought him in the Superior Ambulance.

Q. And you brought him to your home, is that correct? A. Yes, I did.

Q. Now, what time did you arrive on this particular day?

A. Well, it must have been between 5:00 and 6:00. I remember the driver said we made good time.

Q. All right. Now, after you had arrived home, did you receive a phone call?

A. Well, after I arrived home that day? No, not that day.

Q. Well, did you receive a phone call the next day, then?

A. Well, it may have been the next day or the next, I just don't quite remember, but there was a phone call.

(Testimony of Lelia G. Gardner.)

Q. At or about the 21st of November, '49, is that correct?

A. Well, it could have been just about that time. It was the 18th I brought him home.

Q. Now, if you brought him home on the 18th, then it was around the 21st you got the phone call, is that it? A. Well, about that time. [173]

Q. All right. You received this phone call, is that correct?

A. I received the phone call.

Q. Who answered the phone?

A. Well, I answered the phone.

Q. And did the person on the other end identify herself? A. Yes, they did.

Q. And what did she say?

Mr. Perillat: To which——

The Court: Wait, wait. "They" and "She"? Persons?

Mr. Fluharty: Who was the person?

A. Well, the woman said she was Frances Gardner and I said "Well, you must have the wrong number. We haven't any Frances Gardner that I know of."

Q. And then what did the person on the other end of the line say? A. Well——

Mr. Perillat: To which I object.

The Court: Wait. Wait. There is an objection. What is the objection?

Mr. Perillat: The objection is, incompetent, irrelevant, and immaterial. There is no foundation

(Testimony of Lelia G. Gardner.)

laid that tends to prove any issue involved in this action.

Mr. Fluharty: This is preliminary. We are laying the foundation?

The Court: That doesn't tell me anything. For what [174] purpose do you offer this conversation?

Mr. Fluharty: I would like to make an offer of proof, if I could.

The Court: The jury may step outside.

(Whereupon the jury retired from the court room and the following proceedings were had outside of their presence and hearing.)

The Court: All right. The jury is absent. What is the offer of proof?

Mr. Fluharty: Your Honor, I wish to show by the testimony of this witness that Mrs. Hester, who at that time, of course, was not married to the decedent, called him, calling herself Mrs. Gardner, and that when the decedent talked to her on the phone during the course of this telephone conversation, he went into a psychotic incident, attempted to commit suicide by slashing his wrist and butting his head against the wall, and it was necessary to call an ambulance in order to restrain him.

The Court: 1949?

Mr. Fluharty: Yes, your Honor, 21st of November.

The Court: How does that help me decide, and the jury, decide whether or not the designation of beneficiary as of April 30, 1950, was a voluntary act?

(Testimony of Lelia G. Gardner.)

Mr. Fluharty: Well, to answer that, your Honor, very closely thereafter we showed the hospital records, and they [175] have already indicated he doesn't do well under tension, and that the relationship of Mrs. Hester was tenuous and not good for him, and we want to show by this the mere fact he received a phone call from her threw him into a psychotic incident and made him attempt to commit suicide as a result of the phone call from Mrs. Hester, which would certainly show the influence of her would fit into the prognosis, the highly guarded prognosis of the Medical Staff of the Letterman General Hospital. He had just been released a few days before, and he said any relationships would be bad for him.

The Court: What does it tend to prove? That he was insane or temporarily at the time of 1951 when he executed this change of beneficiary, or does it tend to prove, together with other evidence in this offer, this woman exercised undue influence upon him for the purpose of having him change the beneficiary, or what?

Mr. Fluharty: It shows this woman contributed to his mental state which we maintain, whenever he is under stress or excitement, would have a psychotic incident, and this is one example.

Mr. Perillat: Your Honor, may I be heard on this one point? There is no evidence at all that on April 30, 1951, this man had any psychotic incident. And furthermore, so far as—well, I won't go any further. [176]

(Testimony of Lelia G. Gardner.)

Mr. Fluharty: Of course, they are going to introduce into evidence a deposition to show the very day in question he wondered whether life was worth it. That's successful impeachment. Actually, we don't have the evidence. We have to have circumstantial evidence. Here it is our contention that the stress under which he was living with this woman when they were not married, and whenever she called him, would cause him to go into tremendous paroxysms of epileptic seizure, even have a psychotic seizure here, attempts suicide. Shows the whole picture.

The Court: It's 1949. I am interested in April 30, 1951. Is this the beginning of a series of things you are going to show, leading up to April 30?

Mr. Fluharty: It ties in to the medical report.

The Court: But it doesn't help me unless it continued until '51. If at the time he changed this beneficiary on April 30, 1951, he was under the spell of one of these hypnotic, whatever you call it, psychotic incidents, why, certainly that is very definite evidence, but he may have had one the day before and on the day in question be perfectly all right.

Mr. Fluharty: All we can do in order to show the influence of this woman is to show what happened when he gets in contact with her. Here a mere phone call.

The Court: Influence in what way? Influencing his health [177] and causing him to have one

(Testimony of Lelia G. Gardner.)

of these incidents at the time of changing his beneficiary? Can you show that? Are you prepared to show she influenced him to the point where he was under one of these spells when he changed his beneficiary?

Mr. Fluharty: No, we don't have that, but we do have this.

The Court: I know, but this isn't related to that.

Mr. Fluharty: Well, I recognize it's largely a matter of discretion with this Court, but, after all, it's the only way we can show the man's state of mind to create the entire picture before or after the event.

Mr. Perillat: I believe they are trying to create a state of mind that did not exist, your Honor.

Mr. Fluharty: We have here a fairly established pattern starting in December, 1942. He has flicker blackouts, and then he gets grand mal seizures. This is merely one more——

The Court: But that kind of a person, when he is not under one of those incidents, can do many things that are perfectly legal. Now, unless you can show that what he did was under the stress of one of these spells or that somebody caused him to get into one of them in order to cause him to do something in their behalf—it's very interesting and it's very pathetic, but it doesn't help us to decide the issues.

Mr. Fluharty: Well, your Honor, of course our contention is it does show it and I have an instruction which I have [178] requested, and there's

(Testimony of Lelia G. Gardner.)

authority for them, that it's not natural for a person to disinherit his children. Those are the prime objects of his bounty. And the only way we can show this whole picture is this evidence, because this is the only evidence we have, and this is one more fact to take into consideration to show the whole picture, before, at, and after. We could have come here, put the testimony of the doctor in that there was nothing wrong with him on April 30, 1951, and we wouldn't have had a true picture. I think this is a matter for the jury to decide. Of course, it's within your discretion, and I'm saying I believe it would be within your sound discretion, to allow this to come in as one more circumstance.

The Court: Could you follow it up and bring it up to April 30, 1951, or thereabouts?

Mr. Fluharty: Well, this ties into the prognosis which we read, and the final report of the discharge from the hospital in December of 1950, which stated, if he had any emotional stress whatsoever, he would have a psychotic break, and we show here from a mere phone call from this woman he goes into a psychotic break where he tries to commit suicide.

The Court: The evidence also is he later married the woman.

Mr. Fluharty: The whole debacle ended in its final and inevitable conclusion, in suicide, tragedy played its way out. [179] That's our point. Of course, you have already taken it out——

The Court: No, I haven't either. You haven't

(Testimony of Lelia G. Gardner.)

made any contention there was any suicide here. Have you got any evidence to that effect, or haven't you?

Mr. Fluharty: I don't see any evidence that is contrary.

The Court: Well, that isn't the point.

Mr. Perillat: Excuse my interrupting—

Mr. Fluharty: Well, the point I am making is—of course, we are out of the presence of the jury—I went to the Secretary of State this morning. He says, as far as they know these records are perfectly competent, and they wouldn't change them if I mandamused them.

The Court: I know the Department have done lots of things that are contrary to law, but that doesn't make it right, but we are past that point. Other than that word by some doctor, who obviously didn't know who violated the law in making an assertion of positive fact distinguished from a probability, other than that, you haven't got a single iota or shred of evidence there was any suicide.

Mr. Fluharty: Just that, yes.

The Court: I think this 1949 thing is too far away to be helpful on any of the issues in this case. It may be perfectly true in 1949 when it happened, I don't doubt that, but, unless you can connect it up with the disputed change of beneficiary on April 30, 1951, more directly than you propose, [180] I can't see where it would help us

(Testimony of Lelia G. Gardner.)

in the slightest. I am going to decline to accept your offer of proof and call the jury back.

Mr. Fluharty: Thank you, your Honor.

(Whereupon the jury returned to the court room.)

The Court: The jury is now present.

The objection of the pending question having been sustained, the offer of proof made in the absence of the jury denied, you may continue.

Mr. Fluharty: Thank you, your Honor.

Q. In October of 1950, did your son visit with you on that particular occasion, some time in October of 1950?

A. 1950? Yes, he came home to me on October the 2nd.

Q. Of 1950? A. 1950.

Q. And he visited with you in your home, is that right, Mrs. Gardner?

A. Well, yes, he arrived at eleven something, and he was very much disturbed.

Q. In the morning or evening?

A. Evening.

Q. 11:00 o'clock in the evening of that day, do you remember? A. I think it was a Tuesday.

Q. About what date?

A. Well, I think it was the 2nd. [181]

Q. October the 2nd, then?

A. Yes, October the 2nd.

Q. And he came home to you in the evening around 11:00 o'clock, and he was disturbed, is that correct? A. Yes, he just—

(Testimony of Lelia G. Gardner.)

Mr. Perillat: To which I request the Court to instruct the witness not to go beyond the scope of the question.

The Court: Yes, just answer the question you have been asked. Don't volunteer any information until it's asked. He was disturbed.

Q. (By Mr. Fluharty): He was disturbed, is that correct? A. Yes.

Q. And did he make any statements to you with respect to his relationship with Mrs. Hester?

A. Well, he said that he——

Q. Just a minute. Just answer the question.

A. Yes.

Q. Did he make a statement? A. Yes.

Q. All right. Now, did he state whether he had just seen Mrs. Hester?

A. Well, he said that some time between 4:00 and 5:00 he had left her.

Q. And he had——

A. At the Dowe Realty Company. [182]

Q. Left where?

A. At the Dowe Realty Company in Palo Alto.

Q. In Palo Alto? A. Yes.

Q. And he told you he had left her about 4:00 o'clock that afternoon?

A. Yes, between 4:00 and 5:00.

Q. Did he make any statement as to why he left there? A. Well——

Mr. Perillat: I object on the basis it is incompetent, irrelevant and immaterial, does not tend to prove any of the issues in this case. Why he left

(Testimony of Lelia G. Gardner.)

to come to Sacramento. It has no bearing on his condition on April 30 of 1951.

Mr. Fluharty: This is a lot closer, your Honor, than the previous one.

The Court: She may answer. Go ahead.

Q. (By Mr. Fluharty): Did he make a statement as to why he left her? A. Well, yes.

Q. Yes, is that correct? A. Yes.

Q. All right. Now, what did he say?

A. He said, "I am in an awful mess." He said, "Mrs. Hester has me under a spell." He said she used hypnotic influence on him. [183]

Q. Did he state anything as to whether he was in fear of her? A. Yes, he did.

Q. What did he say?

A. Well, he was afraid of being poisoned.

Q. And what did he say to you? What was the subject of his conversation.

A. Well, he put his hands—his face in his hands and cried. He said, "Mother, I'm in an awful mess. I have found out they are a dope gang down there." Now, that's what he said, and he cried, and then he prayed. He said, "Oh, God, help me." And he was very nervous, and then he went into the bath room, and I said, "Well, Son, I'll fix you some milk." So I gave him hot milk and put him to bed.

Q. And did he state that he was in fear of her?

Mr. Perillat: I object on the basis it is a leading question.

The Court: Sustained.

Q. (By Mr. Fluharty): What other statement

(Testimony of Lelia G. Gardner.)

did he make to you with respect to his relationship with Mrs. Hester?

A. I got him to bed as soon as possible. He was crying just like a child. I said, "Son, I want to get the doctor for you." He said, "No, mother," and he objected, and I put him into bed and gave him this warm milk, but he thrashed all night. I was in a position where I could see him, just out in the other room where I could look in and see him. He was [184] terribly nervous and upset.

Mr. Perillant: Will the Court entertain a motion to strike the testimony based on the same basis the objection was offered?

The Court: Overruled.

Mr. Fluharty: You may cross examine.

Mr. Perillat: I have no questions.

The Court: You are excused. Next witness.

Mr. Fluharty: At this time, your Honor, the Plaintiff rests.

The Court: Very well.

Mr. Perillat: If it please the Court, at this time I have a motion to make pursuant to rule 50, and it has to be—ask it be made out of the presence of the jury.

The Court: You may make your motion, stating its grounds in the presence of the jury, and, if I need argument, I will excuse the jury to hear you.

Mr. Perillat: Pursuant to Rule 50, I ask this Court for a directed verdict in favor of the defendants, Gardner, Haynes, and against the plaintiffs, Glaser and Gardner, on the following basis; that

there is no evidence whatsoever that has been proved in the Plaintiffs' case to show in the first place any mental incompetency or mental incapacity of the deceased veteran on April 30, 1951. There has been no evidence to show he was subject to any organic brain disease which would be the [185] subject of mental deterioration and a progressive thing from which an inference could be drawn, that there was a continuation of a mental instability. There is no evidence whatsoever before this Court to tend to prove that there was any undue influence exercised by Mrs. Hester—or, rather, Mrs. Gardner or Mrs. Haynes, in the execution of this document on April 30, 1951. The sole evidence in this case is that this man suffered from epilepsy, that in September or October of 1950 he had one psychotic incident in Sacramento, was committed temporarily, was discharged from the Veterans Administration as competent on December 22 of 1950.

The Court: Very well. Is the motion resisted?

Mr. Fluharty: Yes, your Honor.

The Court: Very well. The jury may be excused while I hear argument on motion.

(Whereupon the jury retired from the court room.)

The Court: The jury is not absent. I will hear you in elaboration of your motion.

Mr. Perillat: If the Court please, we are dealing here with the mental competency and capacity of an individual to execute a document, whether it be a will or a contract, on a specific date. There

the law is not only Federal, but our State Law is that you have got to show the mental incapacity at the time that the document was executed.

Speaking of undue influence, you have to even show the [186] undue influence was exercised at the very moment. The fact there was an opportunity for the exercise of undue influence is not sufficient under the law. The law recognizes, however, that in certain types of mental diseases where there is proved objectively a mental deterioration of the brain, where there is a progressive deterioration, once there is established incompetency, then the law will say that that type of a deterioration by act of nature will be presumed to be continued. We do not have that in this case. We have here only the fact that a man suffered from epilepsy. We have the records of the hospitals that treated him for his epilepsy. The record shows that he did have a certain emotional instability along with these epilepsy seizures. The evidence is that this veteran was discharged, and this is the evidence, I may add, that this man was discharged on December 22 of 1950 as competent, and that is in evidence, and it's undisputed. There is no evidence following December 22, 1950, from which any inference could even be drawn that this veteran ever had a subsequent epileptic seizure or ever had a subsequent psychotic break.

There is no presumption of insanity in this case, nor is there a presumption of incompetency. The last evidence is September 22, 1950, as to competency or incompetency of this man, and I say there

is a total failure of proof of incompetency on the date alleged. [187]

The Court: Mr. Fluharty; you wish to be heard?

Mr. Fluharty: Yes. Your Honor, the Complaint is in three causes of action. One cause is there was undue influence, the other was incapably executing a change of beneficiary because of a legal disability, and the third one was he was of unsound mind.

Now, the case of Taylor vs. The United States, and also the case of Brown vs. Emerson, both of these cases are cited for instructions, one for Instruction No. 18 and the other one for Instruction No. 19. I point out that one of the great tests is the natural objects of one's bounty.

Now, the interesting thing here, there is no evidence in this case yet to show that Mrs. Hester is the wife. All she is is the stranger at this time. That's the only evidence. And, of course, as of this date, April 30, 1951, she was not the wife of this decedent. She was not a member of the family circle, and, consequently, we claim this comes under the rule of Brown vs. Emerson.

Now, we have here a case as of the date where we stand on this trial, that a stranger to the person, a stranger who has flitted in and out of this evidence here, Mrs. Hester, we do have evidence of the fact he was afraid of her, ran away from her, but she was part of a gang that was trying to dope him.

That's the evidence, the uncontradicted evidence, to which there was no cross examination made.

And our point is that this [188] falls squarely on Taylor vs. U. S. and Brown vs. Emerson in this stage of the proceeding. It's unnatural to disinherit your two minor children in favor of someone who is a stranger and in favor of her daughter, who is just as old as the person who made the change of beneficiary.

In addition to that, we have had guarded prognosis and, in all likelihood, would suffer a psychotic break. Allowing him to leave the house with Mrs. Hester was the best of a bad situation. So we submit there is sufficient evidence in which to draw the inference because of the unnaturalness of the request at the time of the change on April 30, 1951, that he lacked a necessary testamentary capacity because it is absolutely unnatural to disinherit——

The Court: Well, doesn't a man who has life insurance in which he has reserved for himself the right to change his beneficiary, the right to exercise that right without restrictions?

Mr. Fluharty: Well, counsel has made reference to that. Most of them are off of the angle of vested right. As I understand the rule, as it used to be and still is the rule in many states, if you make a person a beneficiary under the third party contract, they would have an interest in the proceeds, and you couldn't change the beneficiary without their consent. But the cases which I have read in this particular field, pointing out he had a vested interest, [189] pointing out the beneficiary had no vested interest, was done to refute the third party

beneficiary theory and had no idea they had such a vested interest, that they would be entitled to the proceeds, if the person were insane. I think those cases go off on the contractual theory of the third party beneficiary. But that doesn't mean that they have the absolute right to make this change if he's suffering delusions or if he doesn't have the necessary mental capacity.

The Court: Well, you are mixing up things here, aren't you? The proposition for which you have been contending is unrelated to mental condition. You are telling me that where a perfectly sane person who has the right to change the beneficiary so changes it in favor of a stranger and against a member of his family, that that cannot stand?

Mr. Fluharty: No, I'm saying that's one factor along with all the other evidence——

The Court: To show what?

Mr. Fluharty: To show he didn't have a requisite mental capacity because the test is: One, that he must know the nature and extent of the act; Two, the nature and objects of his bounty; and, Three, the nature and extent of his property.

Well, this is one of those three tests, that is, that he—and I'm saying that in accordance with the *Brown vs. Emerson* case, this is the fact to be taken into consideration, the fact it's unreasonable to disinherit your children in favor of [190] a stranger.

The Court: Well, I'm not sure that there is any evidence here that he did disinherit the children.

All I can say is they didn't get this insurance.

Mr. Fluharty: Well, that's the point I am making with respect to the particular insurance. In other words, the cases hold that you apply this testamentary test to the contractual act, in this *Brown vs. Emerson* case it says, "If the proceedings of the will are unjust, unreasonable, and unnatural, the Court may consider that fact as a circumstance in determining the mental capacity of the testator." And that's the case that was cited in *Taylor vs. United States*.

The Court: All right. Supposing you got that. What else have you got?

Mr. Fluharty: Well, we have the prognosis of the Court—I am sorry. Not of the Court, but of the last hospital he was in, pointing out the prognosis was guarded, and there was a good chance for psychotic breaks in the future upon which we could base an inference in this case there was something wrong on this particular day in question.

The Court: What supports that last phrase? The only thing that you showed me was wrong on a date reasonably here in the event in question was October, 1950. I let you put that evidence in on the theory you are beginning there to get close to the event, but you stopped right there. That's all you had. [191] I probably should have stricken it, but I left it in to look at. There's nothing to support he had one of these psychotic breaks on the day in question, is there?

Mr. Fluharty: Of course, we do have the deposition which has been stipulated to.

The Court: It's not in evidence.

Mr. Fluharty: It would show he was under stress on that day.

The Court: It's not in evidence and doesn't show anything. All right. Supposing we proceed. Haven't you anything further?

Mr. Fluharty: No, your Honor.

The Court: All right.

Mr. Perillat: Does your Honor wish a reply to that?

The Court: If you have one to make, I'll hear you.

Mr. Perillat: It appears to me, if the Court please, that counsel is confusing two different rules of law. It is the rule that in considering mental competency, the test is whether or not the testator at the time, the specific time in question, knew the nature and extent of his property. Those who had the first claim upon his bounty, and his relationship towards those people. The law does not say that because your children may have first claim on your bounty that if you leave them out of an insurance policy, that insurance policy designation must be void. And I believe that counsel's [192] argument is directed towards that because this whole case is built on the fact that this man is insane because he left his children out of the designation of beneficiaries of this insurance policy.

Now, as a matter of fact, on the designation of insurance policy of September 14 preceding this one, the children were not mentioned in that desig-

nation at all, and that is the designation of beneficiary upon which these people would walk out of court with \$10,000.

Now, the rules, the Federal rules as we have stated before, are not inconstant. I have outlined the Taylor case and all the rest of them, and I am sure the Court is well familiar with the rules of mental competency and the proof which must be adduced to destroy the solemn act of a person such as that in the execution of a deed, will, or any instrument of this nature.

Again, I say there is no evidence of incompetency, and to allow this to go to the jury would be broadest type of speculation and conjecture because there is no evidence, so far in this case as to the condition of this man on the date in question. And, furthermore, there are no presumptions from which an inference could even be drawn.

I should like to read a short resume to the Court which is considered the leading case in California on testamentary capacity. It's the case of Perkins, found in 195 Cal. 699, and there our Supreme Court says: "It is well settled that, upon [193] the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testator at the time of the execution of the will is the question to be determined. The presumption is always that a person is sane and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testator was of unsound mind at the time of the execution of the will."

And I submit there was no evidence in support of that as required by that case.

Thank you, your Honor.

The Court: I am going to grant the motion. There has been a failure of proof here. Call the jury in.

(Whereupon the jury returned to the court room.)

The Court: Let the record show the presence of the Jury.

Ladies and gentlemen of the jury, at the conclusion of the Plaintiff's case, a motion having been made for a directed verdict and argument upon the motion having been had in your absence, it has been the Court's decision and ruling to grant the motion which I now hereby do and direct you to return a verdict against Plaintiffs and in favor of the Defendants for reasons of failure of proof with respect to each of the three causes of action outlined in the Complaint.

The first cause of action alleges the defendant to have been mentally incompetent as decreed by an Order of the Superior Court [194] of California; and, hence it is alleged that at the time of the change of beneficiary on April 30, 1950, the veteran was incompetent to legally change his beneficiary.

The evidence affirmatively shows that the man was never adjudicated insane by any Court, but he was committed for mental illness and thereafter discharged from the hospital as competent. And there is no basis for any presumption that he was at any time mentally incompetent or that any such

presumption, if it ever did exist, continued after he was discharged from the hospital as competent. The mere fact that the man was subject to attacks of epilepsy and may have suffered what they call psychotic breaks during fits of epilepsy, does not, in and of itself, prove in the slightest that he was, on April 30, 1951, the date upon which he changed his beneficiary, under the influence of any one of those psychotic breaks, or in any way mentally incompetent.

It is alleged in another cause of action that he was in fact mentally incompetent. There has been a complete failure of proof in that respect. There has been absolutely no evidence tendered to show that on April 30, 1951, he was mentally incompetent, and legally thus incapacitated from executing a change of beneficiary.

The third cause of action charges the defendants with having exercised undue influence upon the veteran for the purpose of causing him to change the beneficiary previously existing in [195] their favor as of April 30, 1951. Here, again, there has been a complete failure of proof.

Accordingly, for failure of proof as to each of these causes of action, I am directing you to return a verdict against the Plaintiffs and in favor of the defendants. Under Federal law, a veteran possessing Federal insurance as a veteran, has an absolute right to change his beneficiary. The mere fact that he changes it in favor of a stranger and does not direct that the benefits of it flow in favor of some member of his family does not in and of

itself in the slightest indicate that he is insane or mentally incompetent. He may be a so and so for having so done it, but that doesn't mean he's mentally incompetent.

We have had here the brother and sister of this veteran suing in their own individual names, not as guardians of the veteran's children, seeking to have this insurance adjudicated by this action in such a way so *as the* the benefits of it will flow to them.

There has been an effort made, during the course of this litigation, to bring into consideration for the jury things that were irrelevant, which had sympathetic tones, and overtones that were not evidence, which I have excluded, such as the pictures of the little children and the pictures of the family, and so forth, all of which may have been interesting but beside the point as to the validity of this change of beneficiary on April [197] 30, 1951. I have also excluded a great many letters written by the veteran to his brother and sister and to his mother and aunt because, again, they did not bear on the state of his mind as of April 30, 1951. They related to matters years prior when he indicated that he was very fond of his children, and there has been no dispute in this case that he was or was not fond of his children because that was not in issue.

One particular letter was endeavored to be introduced into evidence which would have disclosed, if I allowed it into evidence, that the veteran, in the year which it was written—the particular year I forget at the moment,—I think it's 1950, October

—after visiting his children and his family, mother, brother and sister, expressed satisfaction with the way the children were being cared for; and with respect to the state of the insurance policy at that time, which was in favor of the brother and sister, the plaintiffs herein indicated that he was sure that they would use the money in the event of his death for the benefit of the children. On the basis of that it has been contended here on the basis of legal argument there was a constructive trust created in favor of the children. I am saying this to you largely for the benefit of the Plaintiffs who may not understand some of the legal rulings that have been made, but in the event the case which they made out was proven and a verdict went for them they would be entitled to the insurance money; and, if they [198] failed to discharge their moral obligations to the children, they would be either a moral problem or a trust problem, the subject of litigation aside from this. But the only question in this case was, did this man, this veteran, legally change his beneficiary on April 30, 1951. The act which he did on that date is on its face perfectly valid, and there has been a complete failure of proof, as I have indicated before, of any mental incompetency, either in point of law or fact, and a complete failure of undue influence in effecting this change of beneficiary; therefore, the act of this deceased must stand as perfectly valid. I therefore have directed you to return a verdict as indicated against the Plaintiffs and in

favor of the defendants. And Mr. Clerk, what is the custom in this jurisdiction, to have them execute such a verdict?

The Clerk: I think it is, your Honor.

The Court: I will call a short recess and have you prepare one for the signature and I will designate the first lady in the first row as the foreman to sign the verdict at the direction of the Court and in compliance with direction. After it has been recorded the parties may no longer record any exceptions they wish to take to my direction. We will take a short recess.

(Recess.)

The Court: Very well. Note the presence of the jury and— [198] Lost my chart. I can't think of your name. Oh, there it is—Having designated Mrs. Spencer as the Foreman to execute the verdict directed by the Court, I will ask you, Mr. Clerk, to give her the form which says, "We, the jury, find in favor of the defendants as we have been directed by the Court," and if you will give her the facility for signing it—— [200]

* * * * *

[Endorsed]: Filed Oct. 31, 1957.

[Endorsed]: No. 15789. United States Court of Appeals for the Ninth Circuit. Helen May Gardner Glaser and George R. Gardner, Appellants, vs. Frances Shenk Hester, also known as Frances Shenk Hester Gardner and Willane Hester Haynes, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: November 18, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,789

United States Court of Appeals
For the Ninth Circuit

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER,
Appellants,

vs.

FRANCES SHENK HESTER, also known as
Frances Shenk Hester Gardner and
WILLANE HESTER HAYNES,
Appellees.

BRIEF FOR THE APPELLANTS.

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FILED

MAR 20 1958

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No. 15,789

**United States Court of Appeals
For the Ninth Circuit**

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER,
Appellants,

vs.

FRANCES SHENK HESTER, also known as
Frances Shenk Hester Gardner and
WILLANE HESTER HAYNES,
Appellees.

BRIEF FOR THE APPELLANTS.

I.

JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Northern Division (Cl. Tr. pp. 20-21). Notice of Appeal to this Honorable Court was timely filed (Cl. Tr. p. 21). The causes of action were for the recovery of the proceeds of a National Service Life Insurance Certificate issued on December 1, 1942, by the United States on the life of one William E. Gardner, Jr., who died on March 16, 1952. Jurisdiction is

conferred on the District Court under 38 U.S.C., Sections 445 and 817. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291 and 38 U.S.C., Sections 445 and 817.

II.

STATEMENT OF THE FACTS.

William E. Gardner, Jr., veteran of World War II, had issued on his life a National Service Life Insurance policy in the sum of ten thousand dollars (\$10,000.00). This policy was taken out on December 1, 1942. He died on March 16, 1952. The policy was in force at the time of his death and the United States does not deny liability thereon. The controversy is between claimants to the proceeds.

On September 14, 1950, the Appellants had been designated as the beneficiaries under the life insurance policy (Cl. Tr. p. 70). On April 30, 1951, the decedent purported to execute a change of beneficiary, designating the Appellees as the persons to whom the proceeds of the policy should be paid in the event of his death. Appellants attack the validity of this change in beneficiary.

Appellants' complaint is in three counts. Counts I and II of the complaint predicate the invalidity of the change of beneficiary executed by the decedent on April 30, 1951, on mental incompetency. Count III predicates invalidity on coercion and undue influence exerted upon the decedent by the Appellees (Cl. Tr.

pp. 3-10). The answer filed by the Appellees put these matters in issue (Cl. Tr. pp. 11-13). Thereafter a trial was had to a jury. Upon the close of the Appellants' case, the District Court sustained a motion for a directed verdict, directed the jury to return a verdict for the Appellees, and entered judgment for the Appellees accordingly (Cl. Tr. pp. 18-20).

III.

THE EVIDENCE.¹

A. The Medical Evidence.²

Exhibit A. Report of Physical Examination, Mather Field, California, dated May 25, 1942 (Cl. Tr. p. 27).

This record discloses that William E. Gardner, Jr., joined the Armed Forces of the United States in May, 1942, and, after a physical examination, was found physically fit for military service.

¹Pursuant to a request for admission filed by the Appellants, the Appellees stipulated to the genuineness of the documents enumerated in the request, reserving the right to object to the admission of these documents in evidence on the grounds of competency, materiality, and relevancy (Cl. Tr. pp. 14-17).

²It is conceded that the extracts quoted from the medical records are selective. It is obvious that to quote all of the medical evidence would unduly prolong this brief, but more important, since the basic question is whether there was sufficient evidence to submit the issue of mental competency to the jury, it appears necessary that the attention of this Court be called to that portion of the evidence which bears primarily upon this question. See arguments under Point II.

Exhibit B. Proceedings of Army Retiring Board in the Case of First Lieutenant William E. Gardner, Jr., held on February 2, 1945 (Cl. Tr. p. 29).

This record discloses that in December, 1942, Gardner went on a field problem at Fort Monmouth and received a head injury which resulted in his developing idiopathic epilepsy. Epileptic attacks began in December, 1942, and increased in severity and in number both overseas and while in the Eighth General Hospital. At the conclusion of the hearing, the Board found that Gardner had been incapacitated as a result of an incident of service, that the incapacity was Epilepsy, mixed type, grand mal, and petit mal, and that the incapacity was permanent. The hearing further developed that emotional or physical stress could cause the attacks to recur.

Exhibit D. Application for Hospital Treatment or Domiciliary Care, dated November 25, 1946 (Cl. Tr. p. 36).

The history attached to this application sets forth, among other things, as follows:

“Last Saturday, [November 23, 1946], two days ago, while at home patient suddenly became very weak, and felt as though he were going to lose consciousness. This was accompanied by a severe contracting type headache. However, he did not completely lose consciousness, nor did he have any convulsions. He had no previous similar episode. He had some difficulty getting in touch with his Doctor, but after contacting him, he took more Dilantin, as was prescribed. This resulted in almost complete subsidence of the head-

ache, but the weakness persisted, and although much less, it is still somewhat present."

The physical examination then notes that the matter should be referred to the Neurologist, that there is "possible recent cerebral organic change."

Exhibit E. Application for Hospital Treatment or Domiciliary Care, January 13, 1948 (Cl. Tr. p. 38).

The symptoms disclosed on the medical portion of this Exhibit recite "irritability, confusion, mild black-outs without falling but with occasional Sphincter incontinence."

Exhibit F. Summary Report on William E. Gardner, Jr., dated December 4, 1948 (Cl. Tr. p. 39).

The data as of April 28, 1948, recite, among other things, as follows:

"This 29-year old white male gives a history of having flicker black-outs beginning in December of 1942. . . . Early in 1944, the patient was shipped overseas to the South Pacific and after about six months he began to have about 10-12 flicker black-outs daily. With this development, the patient turned into the hospital for examination. He was subsequently returned to the States to Letterman General Hospital and subsequently to DeWitt General Hospital . . . The patient was discharged from DeWitt General Hospital on 3/19/45, with a diagnosis of grand mal and associated petit mal Epilepsy and was placed on Dilantin—gr. 4½ daily.

"From that date to the present the patient has been maintained on that medication with fair control. However, within recent months, the pa-

tient has experienced severe financial set-backs and marital difficulties. These factors have been aggravated by increasing frequency and severity of seizures."

Exhibit G. Psychiatric Report on William E. Gardner, Jr., July 29, 1949 (Cl. Tr. p. 41).

The statement of Dr. Brownfield, Psychiatrist, states in part:

"... In his visits, he has shown much verbal aggression, which is barely disguised, against the Creator who seems to be representative to him of all authority figures and of his father who deserted his mother when the patient was seven years old. All this hostility and a dependency upon others for reassurance and support is thinly veiled. Some paranoid trends are evident but thus far no psychotic evidence is present."

The clinical and psychological data attached to this Exhibit sets forth among other things, the following:

"Intellectually, the patient is of high average intelligence, but his productivity is severely restricted by the rigid intellectual control that he must use in dealing with his environment. His perception of reality is more determined by his inner needs than by obvious factors which results in quite idiosyncratic perceptual processes.

The patient is basically a rigid individual who has overwhelming dependency needs and hostile impulses which he cannot accept. His attempt to deal with these is primarily through the mechanisms of denial and projection. He is an immature individual who is striving constantly

to preserve his masculinity and potency by, what are essentially, reaction formations. . . .

He possesses an active fantasy life which is immature and in which projection mechanisms play a major role. In fantasy, the ideas of grandeur are frequent, and it is probable that he has difficulty distinguishing between fantasy and reality.

This patient shows much sexual maladjustment, and he cannot accept the active masculine role in a heterosexual relationship since this role is confused with aggression. Furthermore, there are strong homosexual conflicts at an unconscious level which demand the mobilization of defenses. . . .

Diagnostically, the patient presents the picture of a paranoid personality with compulsive trends. He is not presently psychotic; however, the extensive projection, the difficulty in distinguishing reality, and the nature and strength of the defense mechanisms indicate that a psychotic break is possible if additional stress from the environment is met.

This patient is basically a paranoid personality whose present picture is that of a compulsive neurotic. His defense of denial, rigid overcontrol, repression, projection, compulsion, and reaction formation are primarily directed against unacceptable hostile impulses, overwhelming dependency needs, and homosexuality."

Exhibit H. Hospital Record of Veterans Administration Hospital for period October 6, 1949, to November 8, 1949 (Cl. Tr. p. 44).

The laboratory data include the following statement:

“... The family was notified that the patient was both physically and mentally ill and that there was a possibility of an expanding type of lesion of the brain as indicated by his last EEG. Family was also notified that the patient at the present time was not considered mentally competent . . .

Status on Discharge: 1. Epileptic status improved over entry.

2. Mental status, poor.”

Exhibit L. Record of Veterans Administration Hospital, from October 11, 1950, to December 22, 1950 (Cl. Tr. p. 53).

This is a voluminous record of Gardner's hospitalization, treatment, and condition. The doctor's progress notes are set forth chronologically. Dates will be noted to facilitate the place in the Exhibit from which the extracts are taken. The following is from the “History” sheet.

“... The present episode which brought him to the hospital occurred on October 5, when at his mother's apartment in Sacramento he became suspicious of his mother and brother, thought they were trying to keep him from reaching the police and thought that other people he knew were tying him in with a dope racket. He attempted to contact the police by telephone from a store near his home but was not satisfied. He set out to the police station and accepted a lift from a woman who was passing in an automobile and when she attempted to stop her automobile and run away he began to fight with her and struck her several times. The police finally arrived and

took him to jail, from where he was transferred to the Sacramento County Hospital and sent to VAPA October 12, 1950."

The clinical and psychological data of October 21, 1950, sets forth as follows:

"The patient is above average in intelligence and does not show evidence of deterioration of his intellectual capacities, per se, due to brain damage. At present he feels he is under scrutiny and he is making an effort to appear normal and sensible. He is quite guarded and cautious in revealing himself. Although there is a surface appearance of normality, when he is put under emotional pressure, his control weakens and shows evidence of bizarre and unrealistic thinking of a psychotic nature."

"His brittle control may break, and he reacts in an impulsive, erratic manner, or else he may distort reality in a paranoid manner and find reasons to justify the expression of his hostilities. During these periods his behavior will be psychotic and unpredictable."

Doctor's progress notes of October 18, 1950:

"Mr. Gardner's girl friend, Mrs. Hester, was interviewed yesterday. She has been putting much pressure on the front office to have the order rescinded which prohibits her from visiting patient . . .

. . . She is some 15 years older than the patient, has a married daughter of her [own]. They have been living together for some three years now and plan to marry when divorce becomes final.

Mrs. Hester is a tall woman, about 45, somewhat thick features, masculine voice and manner. She emphasized how proud she was that she was not too feminine and disliked being catty. Wondered if patient could be benefited by truth serum or hypnotism. Stated that he had exhibited no bizarre behavior with her except that periodically he would become quite fearful of wife's agents being outside and would pull the shades down in their rooms. She believed his delusions were the result of lack of medication and ideas planted in his mind by his mother. Believes that many of his seizures are a response to psychological episodes."

Doctor's progress notes of October 23, 1950:

"... There continues to be a good deal of conflict between his girl friend, Mrs. Hester, and his mother. He is somewhat evasive whether he intends to contest the action [for guardian]. Patient talked of wanting to marry Mrs. Hester, an older person; one who is more stable than his former wife ..."

Doctor's progress notes of December 22, 1950:

"As expected, prognosis regarding future psychotic break is highly guarded. Enough evidence for future difficulties is present in that the relationship with Mrs. Hester is a very tenuous one, based upon highly neurotic reasons. The attitude of the patient's mother is against any successful adjustment between Mrs. Hester and the patient ... It is noted by the patient that these seizures come and go; directly related to his emotional tension, and it is felt that these may recur as

emotional tension becomes unbearable. It was felt previous to his leaving the hospital that his relationship with Mrs. Hester was the best of a very poor circumstance and his leaving here was also the best of a very poor situation . . .”

The evaluation of December 22, 1950, included in the “Psychological Data”:

“The patient was seen on two occasions. These revealed information consistent with the patient’s hospital behavior and history. The ward staff has discussed this patient on several occasions and has felt that his conflicts are particularly severe and intimately tied to his present relationship with Mrs. Hester. He plans to marry this lady who is over twenty (20) years his senior. We had not been hopeful of any further assistance that the hospital can offer beyond the stabilization of medication. The patient seems unable to benefit from psychotherapeutic or occupational therapy measures which could be taken here.”

B. The Evidence and Testimony With Respect to Gardner’s Understanding, Motivation, and Conduct.

Exhibit O-1. Certified Copy of Death Certificate (Cl. Tr. pp. 67-68).

This document was admitted in evidence with the restriction that the word “suicide” be covered over.

Exhibit S. Judgment of Mental Illness, dated October 10, 1950 (Cl. Tr. pp. 74-77).

This document reads in pertinent part as follows:

“It is ordered, adjudged, and decreed that William E. Gardner, Jr., is a mentally ill person, and

that he be committed to a facility of the Veterans Administration or other agency of the United States, to-wit: Veterans' Hospital at Palo Alto, in accordance with the provisions of Section 1663 of the Probate Code of the State of California."

Testimony of George Robert Gardner (Cl. Tr. pp. 78-87).

It was sought to establish through this witness the relationship between Gardner and his family and conversations with Gardner concerning the insurance policy. The District Court sustained objections to this line of inquiry. Objection was sustained also to the admission in evidence of Exhibit U, a letter dated September 14, 1950, explaining why Gardner made his brother and sister the beneficiaries of the insurance policy.

Testimony of Helen Glaser (Cl. Tr. pp. 87-91).

The Court refused to permit this witness to testify concerning Gardner's love for his children and the manifestations of this affection.

Testimony of Leila G. Gardner (Cl. Tr. pp. 92-117).

Attempts to establish Gardner's affection for his children and his family as indicated in correspondence between Gardner and members of his family were denied by District Court and objections to the admission of such correspondence in evidence were sustained.

Exhibit AB is a letter dated January 5, 1948, from Gardner to his mother, expressing his love for his children and his plans for the future.

Exhibit AC is a letter of July 23, 1948, to his brother and sister of similar import.

Exhibit AD is a letter dated August 1, 1948, in which Gardner expresses a wish to succeed for the sake of his children.

Exhibit AE is a letter dated November 12, 1950, expressing his love for his mother for her interest in him.

Exhibit AF is page 2 of a letter also expressing his love for his children.

Exhibit AG is a letter dated July 20, 1951, addressed to his two sons and expressing his love for them.

Exhibit AH is a letter dated July 20, 1951, addressed to Gardner's aunt who was then taking care of his children. The letter expresses Gardner's love and affection for them.

Exhibit AI is a document dated December 3, 1949, purporting to be Gardner's Last Will and Testament. In this document Gardner attempts to devise and bequeath his estate to Appellant George R. Gardner for the benefit of his children.

Testimony of this witness concerning the conduct of Gardner under various conditions and incidents which caused violent psychotic reactions was ruled inadmissible by the District Court.

At the close of the Appellant's case, the District Court sustained Appellees' motion for a directed verdict and thereafter entered judgment for Appellees.

IV.

THE ISSUES INVOLVED.

(1) Did the District Court err in restricting Exhibit O-1 by covering over the word "suicide"?

(2) Did the District Court err in sustaining objections to the admissibility in evidence of Exhibits U, AB, AC, AD, AE, AG, AH, and AI?

(3) Did the District Court err in sustaining objections to the testimony of the witnesses George Robert Gardner, Helen Glaser, and Leila G. Gardner concerning the relationship between Gardner and his family, conduct of Gardner and his relationship with Appellees, particularly, Mrs. Hester?

(4) Did the District Court err in sustaining the motion for a directed verdict at the close of Appellants' case and entering judgment for Appellees?

V.

SUMMARY OF ARGUMENT.

1. The scope of inquiry concerning the mental competency of one seeking to dispose of property is necessarily broad and should not be unduly restricted by the District Court.

(a) Evidence relating to abnormal conduct such as "suicide" is admissible, and where a certified copy of the death certificate, completed according to statutory requirements, recites suicide as one of the causes of death, such certificate is admissible in evidence.

(b) Where evidence discloses early manifestations of irrational behavior, the period during which such behavior may be shown is necessarily extended.

(c) Letters from the person whose mental competency has been placed in issue revealing his attitudes toward the natural objects of his affections and bounty are admissible in evidence.

(d) Testimony of witnesses concerning family relationships, acts of irrational conduct, and statements of one whose mental competency is in issue are admissible in evidence.

2. The evidence admitted, together with the evidence and testimony erroneously excluded, was sufficient to require the issue of mental competency to be resolved by the jury and the District Court erred in sustaining the motion for a directed verdict at the close of the Appellants' case and in entering judgment for the Appellees.

VI.

ARGUMENT.

1. **THE SCOPE OF INQUIRY CONCERNING THE MENTAL COMPETENCY OF ONE SEEKING TO DISPOSE OF PROPERTY IS NECESSARILY BROAD AND SHOULD NOT BE UNDULY RESTRICTED BY THE TRIAL COURT.**
- (a) **Evidence Relating to Abnormal Conduct Such as "Suicide" Is Admissible and Where a Certified Copy of the Death Certificate, Completed According to Statutory Requirements, Recites Suicide as One of the Causes of Death, Such Certificate Is Admissible in Evidence.**

The basic issue before the District Court was the mental competency of William E. Gardner, Jr., to execute the change in beneficiary on his National Service Life Insurance policy, which change designated Appellees as such beneficiaries. On September 14, 1950, he had designated the Appellants, his brother and sister, as the beneficiaries for the reason that he believed they would provide for his two minor children. On April 30, 1951, Gardner changed the beneficiary to the Appellees, one of whom, Mrs. Hester, was a woman much older than he, whom he had apparently known for a relatively short period of time, and with whom he had apparently been living and whom he subsequently married. From 1942 to the date of his death, Gardner suffered from idiopathic epilepsy. His medical history revealed steady mental retrogression from dizziness, irritability, and confusion, to delusions and fantasy, and then to intermittent mental incompetence, paranoia, schizophrenia, and psychotic manifestations.

On October 10, 1950, he was committed by the Superior Court of Sacramento County as a mentally

ill person. For a considerable period, intermittently, he received hospitalization at various Veterans Hospitals. He died on March 16, 1952.

Appellants introduced in evidence a certified copy of the death certificate (Exhibit O-1). One of the causes of death was listed as "suicide". The District Court deleted this word by causing it to be covered before the document would be admitted in evidence. This, we submit, was error.

The statutes of the State of California require, in the case of a death certificate, that there should be included a statement of antecedent causes leading to death. *Health and Safety Code*, Sections 10275, 10252. In case of suicide, the Coroner must be notified. *Health and Safety Code*, Section 10250. Section 10247 of the *Health and Safety Code*, in effect at the time,³ states that the Coroner or other person whose duty it is to hold inquest on the body of any deceased person shall "state in his certificate the name of the disease causing death, or if from external causes (1) the means of death; and (2) whether (probably) accidental, suicidal, or homicidal."

Death certificates are official writings, *Code of Civil Procedure*, Section 1880, and are admissible in evidence upon certification, *Code of Civil Procedure*, Section 1918, subds. 5, 6. Section 1920 of the *Code of Civil Procedure* provides:

"Entries in public or other official books or records, made in the performance of his duty by

³Repealed, Stats., 1957, ch. 363, sec. 1.

a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.”

Suicide alone does not establish the fact of insanity but it is evidence of insanity and is relevant for consideration along with other evidence. *Ritter v. Mutual Life Ins. Co.*, 69 Fed. 505, affirmed, 169 U.S. 139, 42 L. Ed. 693. In such circumstances, the death certificate is admissible without deletion of the word “suicide.” *Cropper v. Titanium Pigment Company* (CCA, 8th Cir., 1931), 47 Fed. (2d) 1038; *Guardian Life Ins. Co. v. Kissner* (CCA, 8th Cir., 1940), 111 Fed. (2d) 532; see also *Krug v. Mutual Benefit Health and Accident Ass’n.* (CCA, 8th Cir., 1941), 120 Fed. (2d) 296; and *cf Brown v. Maryland Casualty Co.* (CCA, 8th Cir., 1932), 55 Fed. (2d) 159.

In *Cropper* error was claimed in sustaining an objection to the admission in evidence of a certified copy of a death certificate which showed death resulting from sulphuric dioxide gas. Pointing to the Missouri statutes which provided that a certified copy of a death certificate “shall be prima facie evidence in all courts and places of the facts stated therein,” the Court ruled that the cause of death was an issue and that it was error to exclude the death certificate.

In *Guardian Life Insurance Company*, a death certificate was admitted in evidence and it was claimed that such admission was in error. On page 534 the Court states:

“Under the Missouri statute, a certified copy of a death certificate ‘shall be prima facie evidence in all courts and places of the facts stated therein.’ (citing authorities). Previous provisions of the statutes specify what the certificate of death shall contain, and plaintiff’s certificate, Exhibit 5, being the death certificate referred to, indicates that it was required. In *Griffith v. Continental Casualty Co.*, supra [299 Mo. 426, 253 S.W. 1043] the certificate contained recital that, ‘The cause of death was as follows: Shock and injuries (fractured skull). Jumped from window. Contributory (secondary) suicide.’ The Court held that it constituted prima facie evidence of all its recitals.”

It is respectfully submitted, therefore, that the District Court erred in requiring the word “suicide” to be covered prior to the admission in evidence of the Appellants’ Exhibit O-1.

(b) Where Evidence Discloses Early Manifestations of Irrational Behavior, the Period During Which Such Behavior May Be Shown Is Necessarily Extended.

The District Court apparently predicated its rulings with respect to the admissibility of evidence on the theory that it was necessary for Appellants to establish Gardner’s mental incompetency as of April 30, 1951. For example, the Court states (Cl. Tr. p. 82):

“The Court. The only state of mind we might possibly be interested in, and definitely are interested in, is April 30, 1951.”

Again, in the absence of the jury the following colloquy took place:

“Mr. Fluharty. Your Honor, I wish to show by the testimony of this witness that Mrs. Hester, who at that time, of course, was not married to the decedent, called him, calling herself Mrs. Gardner and that when the decedent talked to her on the phone during the course of this telephone conversation, he went into a psychotic incident, attempted to commit suicide by slashing his wrist and butting his head against the wall, and it was necessary to call an ambulance in order to restrain him.

The Court. 1949?

Mr. Fluharty. Yes, your Honor, 21st of November.

The Court. How does that help me decide, and the jury, decide whether or not the designation of beneficiary as of April 30, 1950 (sic), was a voluntary act?” (Cl. Tr. p. 108).

The test, however, is not whether Gardner was mentally incompetent on April 30, 1951. The true test is whether the evidence is of such a nature and of such sufficiency as would enable a jury to draw a reasonable inference of mental incompetency as of that date. An inquiry relating to mental incompetency is not limited solely to direct evidence of the mental condition as of the date of the dispositive act.

Mental infirmities vary in degree and kind. Manifestations of such infirmities are exceedingly diverse. These truisms compel the extension of the scope of inquiry before and beyond the date of the dispositive act to determine whether the degree and kind of

irrational behavior has reached a point at which the law would hold that conduct from which ordinarily certain legal consequences would flow has no legal effect or validity.

To the extent that definition may be attempted, it is said that insanity is that degree of mental unsoundness wherein the person involved does not possess the mental power to form conceptions, true or false, or understand the relation of things or persons. In *Redfield Estate* (1897), 116 Cal. 637, 48 P. 794, the Court puts it in the following words (page 652):

“... It is commonly held that aside from those cases of dementia where the patient has not the mental power to form any conceptions whether true or false, of the relations of things, the true test of insanity is mental delusion; that if a person believes supposed facts which have no real existence, and against all evidence and probability conducts himself upon the assumption of their existence, he is as to that belief under a morbid delusion, and delusion in that sense is insanity . . .”

Mental incompetency is a broader term, and one who is not insane may, nevertheless, be incapable of legally disposing of his property. *Hellman v. Commercial Trust and Savings Bank* (1929), 206 Cal. 592, 275 P. 794. So, also, one suffering from an “insane delusion” is legally incapable of effectively disposing of his property where such delusion is a primary factor in motivating disposition. *Redfield Estate* (1897), 116 Cal. 637, 48 P. 794; *Scott Estate* (1900), 128 Cal. 57, 60 P. 527.

Where the evidence discloses, as it does here, manifestations of irrational behavior over a long period of time, the period during which such behavior may be shown is necessarily extended, since the persistent character thereof and its degree may best be shown by proof of its existence over a long period of time. *Baker Estate* (1917), 176 Cal. 430, 168 P. 881. In this case objections were made to evidence tending to show insanity at a period beginning over fifty (50) years before death on the ground that such evidence was too remote. The Court states (pp. 437-438):

“The question whether evidence of this character is too remote from the time of the execution of the will is a matter resting very largely in the discretion of the trial court. No general rule can be given on the subject. Each case must depend upon its particular circumstances. Where the evidence tends to show that the insanity developed early in life, and was of a fixed and permanent character, the period during which the insanity may be shown is, of necessity, greatly extended. Its persistent character can best be shown by proof of its existence during a long period of time, and evidence thereof is properly admissible in such cases. ‘There seems to be no agreed definition of the limit of time within which such prior or subsequent condition is to be considered; and in the nature of things no definition is possible.’ (1 Wigmore on Evidence, sec. 233, p. 292) The following decisions support the rulings of the court below as to this evidence under the conditions of this case: *State v. Jones*, 50 N.H. 382 [9 Am. Rep. 242]; *United States v. Holmes*, 1 Cliff, 108 [Fed. Cas. No. 15,382]; *Herster v.*

Herster, 122 Pa. 239 [9 Am. St. Rep. 95, 16 Atl. 342]; *People v. Griffin*, 117 Cal. 583, 587 [59 Am. St. Rep. 216, 49 Pac. 711].) Of course, all the evidence on the subject was material only because of its bearing on the question of the sanity of the testator at the time of the execution of the will. Its weight was for the jury to determine."

(c) Letters From the Person Whose Mental Competency Has Been Placed in Issue Revealing His Attitudes Toward the Natural Objects of His Affections and Bounty Are Admissible in Evidence.

The Courts have given weight to a number of factors in reaching the conclusion that a person is insane, mentally incompetent, or suffering from an insane delusion. The unnaturalness of the effect of the document is a circumstance to be considered in connection with other evidence. 57 Am. Jur., Wills, sec. 139, p. 129. The attitude towards relatives and friends and changes in such attitudes, particularly, when such changes are groundless, are relevant factors for consideration in determining mental competency. *Martin Estate* (1915), 170 Cal. 657, 151 P. 138; *Teel Estate* (1944), 25 Cal. (2d) 520, 154 P. (2d) 384.

The correspondence between William E. Gardner, Jr., and his mother, brother and sister revealed quite clearly Gardner's love for his children and his realization that his brother and sister would provide for them. In fact, as is most evident from the letter of September 14, 1950 (Exhibit U), this was expressed by him as the very reason for designating them as the beneficiaries to the insurance policy. The children obviously were the natural objects of his bounty. This

was revealed, also, in Exhibit AI, the document which purported to be the Last Will and Testament of Gardner. Documents such as these are admissible in evidence to prove intention as well as understanding. *Littlefield v. Littlefield* (CA, 10th Cir., 1952), 194 F. (2d) 695.

Two District Court cases placed great stress on the unnaturalness of the dispositive act in reaching a conclusion of mental incompetency. In *Taylor v. United States* (1953) 113 F.Supp. 143, the issue was whether the insured was mentally competent to execute a valid change in beneficiary of a National Service Life Insurance policy. Holding that the decedent lacked the mental capacity to legally effect the change the Court states (page 148):

“To be capable of effecting a valid change of beneficiary a person should have a clearness of mind and memory sufficient to know the nature of his property for which he is about to name a beneficiary, the nature of the act which he is about to perform, the names and identities of those who are the natural objects of his bounty; his relationship towards them, and the consequences of his act, uninfluenced by any natural delusions.

. . . It seems impossible that decedent in his right mind would take away from his wife who had given her life to nursing and caring for their deformed, helpless, and mentally retarded child while he was away at sea, and to make a home for him while he was on the mainland, and give to a father who had been married seven or eight times and with whom the decedent had not been particularly close.”

In *Metropolitan Life Insurance Company v. Anderson* (1951), 101 F.Supp. 808 at 811-12 the Court states:

“Speaking more eloquently than any of the other evidence in the case is the change of beneficiary form. By executing this change of beneficiary form Anderson would take the proceeds of his insurance from his wife to whom he had been happily married, who day by day was selling brooms and mops to support herself and pay the bills incurred by his sickness and who by night—all night—sat in a chair at his side to attend his needs. This change of beneficiary would leave this devoted woman with \$1.00 and give \$1,999 to his mother who deserted him as a child and who remained out of his life until his last illness. This change in beneficiary form would give \$5,000 to Anderson’s son by a former marriage, whom he had seen on two occasions in his life. It is inconceivable that Anderson in his right mind would deny his wife his insurance, or a substantial part thereof, knowing full well of her devotion, of her bills including the anticipated cost of his own funeral and burial, and give this insurance to persons to whom he manifested no attachment whatever during his entire lifetime.”

These cases establish the relevancy, competency and materiality of the excluded exhibits.

(d) Testimony of Witnesses Concerning Family Relationships, Acts of Irrational Conduct and Statements of One Whose Mental Competency Is in Issue Are Admissible in Evidence.

The District Court apparently considered the factor of the unnaturalness of the dispositive act as highly irrelevant and of no significance. Likewise, the District Court excluded testimony concerning family relationships, attitudes, and irrational acts of the decedent. During the testimony of the witness George Robert Gardner the following colloquy occurred (Cl. Tr. pp. 80-81):

“The Court. Well, now, wait. You are talking generally. You got a witness on the stand who said—you asked him something about the veteran’s family, I think is the way you worded it, and there was an objection it was irrelevant, and you made an offer of proof in regard to what this man says.

Mr. Fluharty. I’ll make an offer of proof as to each point. Is that all right?

The Court. All right.

Mr. Fluharty. The first point——

The Court. You offer to prove by this witness that——

Mr. Fluharty. That he has certain members of his family.

The Court. It’s agreed he had a mother, he had a father, he had one wife, and he had two children, and then he had no wife, then he had a wife. What else do you need? And he’s got a brother and sister who are Plaintiffs.

Mr. Fluharty. That’s right. All right.

The Court. What more can you prove?

Mr. Fluharty. It was merely preliminary your Honor. I’m sorry. I don’t want to take the Court’s time. It’s merely preliminary.

The Court. I know what you are getting at, but you may not be at it, at the point here."

Again, the testimony of the witness Leila G. Gardner concerning the effect on the decedent when he heard the name of Mrs. Hester and that such an incident caused him to go into a psychotic state and attempt suicide was similarly excluded (Cl. Tr. pp. 107-14). So, also the conversations which the witness Helen Glaser held with the decedent were not admitted (Cl. Tr. pp. 87-91).

The authorities cited under Point (c) establish that as a matter of law such testimony is relevant, material, and competent on the issue of mental competency.

2. THE EVIDENCE ADMITTED, TOGETHER WITH THE EVIDENCE AND TESTIMONY ERRONEOUSLY EXCLUDED, WAS SUFFICIENT TO REQUIRE THE ISSUE OF MENTAL COMPETENCY TO BE RESOLVED BY THE JURY AND THE DISTRICT COURT ERRED IN SUSTAINING THE MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE APPELLANTS' CASE AND IN ENTERING JUDGMENT FOR THE APPELLEES.

In almost every jury trial the Trial Judge is confronted with the preliminary question as to whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it and upon whom the burden of proof is imposed. In determining whether a case should be taken from consideration of a jury, the Court must first determine whether the evidence is all one way or so overwhelm-

ingly all one way as to leave no room for doubt. *Illinois Terminal R. Co. v. Freedman* (CA 8th Cir., 1953), 208 F. (2d) 675, 679, rehearing denied 110 F. (2d) 229. In making this determination the Court must take as true all the evidence adduced and all reasonable inferences deducible from such evidence shall be given their most liberal intendment. *Swift and Company v. Morgan and Sturdivant* (CA 5th Cir., 1954), 214 F. (2d) 115; *Burcham v. J. P. Stevens & Co.* (CA 4th Cir., 1954), 209 F. (2d) 35; *Continental Casualty Company v. Robertson* (CA 5th Cir., 1957), 245 F. (2d) 604.

In *Swift* the Court stated the rule as follows (p. 116):

“There are several considerations which must be kept in mind on review of a case such as this: It is well settled law that cases are not to be lightly taken from the jury; that jurors are the recognized triers of fact; . . . On a motion for a directed verdict, it is the duty of the court to accept as true all of the facts which the evidence tends to prove and draw against the party making the motion all reasonable inferences most favorable to the party opposing the motion, and if the evidence is of such a character that reasonable men in an impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury.”

In *Burcham* the Court put the rule thusly (p. 37):

“It is well settled that on a motion for a directed verdict or on a motion for judgment n.o.v. based on such motion, the evidence must be considered in the light most favorable to the party

against whom the directed verdict or the judgment n.o.v. is asked, that any conflict in evidence must be resolved in his favor and that every conclusion or inference that can be legitimately drawn therefrom must be drawn . . .”

With these principles in mind, let us briefly review the evidence.

William E. Gardner, Jr., the decedent, was a devoted father to his two children. At the time he designated Appellants as the beneficiaries the children were about five and ten years of age, respectively. Presumably, because of Gardner's illness and marital difficulties the children were cared for and raised by his mother and the Appellants. Exhibit AE indicates they had assumed financial responsibility for the children's welfare, but the District Court curtailed inquiry concerning family relationships. The excluded evidence, however, establishes that (1) Gardner realized a responsibility for his children, and (2) that his responsibility could in part, at least, be fulfilled by leaving the insurance proceeds to the Appellants. Exhibit U eloquently points this out. In this letter, Gardner states in part:

“I realize that the insurance written your way would mean that you would be careful in it being spent for them. I know you would really have a thought for them in every way practical.”

It is true that the Appellants and not the children were the named beneficiaries, but this obviously was Gardner's way of protecting the children. That Ap-

pellants were quite willing to utilize the money for the benefit of the children is revealed in the pleadings wherein Appellants sought to be declared as trustees of the fund for the children's benefit.

On the other hand, what was Gardner's relationship with Mrs. Hester which would naturally make her the beneficiary as against the children? At the time she was designated the beneficiary she was not married to Gardner, although she was living with him. Gardner's hospitalization apparently required some analysis concerning his relationship with Mrs. Hester. The hospital records disclose that she was a woman fifteen or twenty years older than he, with a married daughter. Apparently she was a capable business woman and certainly not in need of his support. She was a dominant personality. The Social Data of December 22, 1950, from Exhibit L contain the following:

“Patient and Mrs. Hester are very much alike in their disdain of people in general and authority in particular. Mrs. Hester says she never deals with the Secretary when the boss is around. Indirectly, her anger and hostility towards the doctors was shown by referring to them as ‘not being dry behind the ears.’ She ‘used’ social worker before the latter was aware of it by coming into me in the morning and in this way visiting patient also prior to visiting hours which enforced for everyone else as 1:00 o’clock. She spoke contemptuously of the other women employees of the Doud Realty Company whose conversation about the clothes and other triviata didn’t interest her.”

The relationship between them was neurotic and tenuous. On December 22, 1950, the doctor sets forth in his notes that:

“It was felt previous to his leaving the hospital that his relationship with Mrs. Hester was the best of a poor circumstance and his leaving was also the best of a very poor situation . . .” (Exhibit L.)

In the Social Data of December 7, 1950, the note was made that Mrs. Hester was a mother substitute. Again, in the Summary of November 23, 1950, it was noted that Gardner “can relate to nurturant mother figures as long as the roles are unconscious.”

The records reveal other instances in which Gardner’s attitudes towards Mrs. Hester was predicated on his unconscious evaluation of her as a mother.

The records of his hospitalization and treatment conclusively establish that Gardner was a mental case and that his sanity was steadily leaving him. His resentment against his mother is based upon a delusion. The history of Exhibit L recites that on October 5, 1950, “he became suspicious of his mother and brother, thought they were trying to keep him from reaching the police and that other people that he knew were tying him in with a dope racket.” It is noteworthy that this incident occurred after he had designated his brother and sister as beneficiaries to the proceeds of the policy. The medical records further disclose that when Gardner was under emotional strain, he showed evidence of bizarre and unrealistic thinking of a psychotic nature, that he would distort

reality in a paranoid manner, and during such periods his behavior would be psychotic and unpredictable. Gardner left the hospital about December 22, 1950, and apparently stayed with Mrs. Hester. On April 30, 1951, four months later, he changed the designation of beneficiary. At the time he left the hospital, however, the doctors carefully stated that the "expected prognosis regarding future psychotic break is highly guarded."

In *Cardwell v. United States* (CA 5th Cir., 1951), 186 F. (2d) 382, wherein the Court had before it the propriety of a directed verdict, the Court states (pages 384-5):

"In order to justify a directed verdict the evidence must be such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict . . ."

Under proper instruction from the District Court and in the light of the evidence adduced upon the trial and the evidence which was improperly excluded, giving such evidence its due weight and drawing therefrom every reasonable inference, the jury could properly have found that Gardner was mentally incompetent to execute the change of beneficiary on April 30, 1951. It follows, therefore, that the District Court erred in sustaining a motion for a directed verdict at the close of Appellants' case and in entering judgment for the Appellees.

VII.

CONCLUSION.

Appellants respectfully contend that the judgment should be reversed and remanded to the District Court with directions to grant Appellants a new trial.

Dated, Sacramento, California,
March 12, 1958.

Respectfully submitted,

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Attorneys for Appellants.

(Appendix Follows.)

Appendix.



Appendix

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No. 15,789
United States Court of Appeals
For the Ninth Circuit

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER,
Appellants,

vs.

FRANCES SHENK HESTER, also known as
Frances Shenk Hester Gardner and
WILLANE HESTER HAYNES,
Appellees.

BRIEF FOR APPELLEES.

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FILED

MAY 16 1958

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No. 15,789

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Appellants,

vs.

FRANCES SHENK HESTER, also known as
Frances Shenk Hester Gardner and
WILLANE HESTER HAYNES,
Appellees.

BRIEF FOR APPELLEES.

JURISDICTION.

Jurisdiction is as noted in Appellants' brief.

PRELIMINARY STATEMENT.

(a) The parties:

Appellants are the sister and brother of William E. Gardner, Jr., a deceased veteran of World War II.

Appellees are the widow of the deceased veteran and her daughter by a prior marriage.

The United States of America is stakeholder of proceeds of the National Service Life Insurance Policy

of the deceased veteran, and is not a party to the appeal.

STATEMENT OF THE CASE.

On April 30, 1951, William E. Gardner, Jr., executed a change in beneficiary of his National Service Life Insurance Policy, wherein he revoked the prior designation of his sister and brother as beneficiaries, and designated appellee Frances Gardner as primary beneficiary and appellee Willane Haynes contingent beneficiary.

Appellees claim the veteran was of unsound mind when he executed the designation of beneficiary on April 30, 1951. (Complaint, First Cause of Action, Para. XII, TR p. 7; Complaint, Second Cause of Action, Para. II, TR p. 8); that the execution of said designation of beneficiary on April 30, 1951 was effected by reason of undue influence exerted upon the veteran by appellees. (Complaint, Third Cause of Action, TR pp. 8 and 9.)

As an incident of his service the veteran developed epilepsy, mixed type, grand mal and petit mal. (TR p. 31.)

In support of their claim of alleged unsoundness of mind, appellees read to the Court and jury selections from this veteran's medical records, covering the period May 25, 1942 to December 28, 1950. (TR pp. 27-66.)

No evidence was offered by appellants on the veteran's condition after December 28, 1950. Their evi-

dence closed with the final report of the Veterans' Administration Hospital at Palo Alto, California, dated December 28, 1950, upon the veteran's final discharge therefrom. (Exhibit "N" TR pp. 64 and 65.) The closing summary of this report was introduced upon the insistence of appellees when it was apparent appellants would refrain from such introduction. This final diagnosis is of major significance in construing the order of directed verdict by the Trial Court:

'Diagnosis: (1) Epilepsy, idiopathic, grand mal, with psychotic reaction of agitated, confused type, chronic, mild, in complete remission, manifested by frequent epileptiform seizures, agitated combative impulsive behaviour, irritability, paranoid trends, and periods of mental confusion. Seizures controlled. (2) Scarring and keloid formation, right anterior and post auricular areas, and pinna, residual burn. (3) Fracture, skull, basal, right, sustained in epileptic seizure November 10, 1949, history of.

'Status: Discharged December 22, 1950, Maximum Hospital Benefit. Was committed. Competent. Has no guardian. [128] Had full ground and pass privileges.

'Signed: R. S. Mowry, M.D., Medical Officer.

'J. T. Ferguson, M.D., Chief, continued treatment service.

'Approved: J. M. Wallner, M.D., Chief, Psychiatry.' " (TR pp. 65-66.)

None of appellants' witnesses saw the veteran after October 2, 1950, when he visited his mother at her

home (TR p. 114), seven months before the designation of beneficiary was executed.

Construing all of the evidence and every reasonable inference deducible therefrom in favor of appellants, the record is absolutely void on the subject of the veteran's mental competency on April 30, 1951. Though appellants had readily available irrefutable evidence of this veteran's mental capacity on April 30, 1951, they chose not to introduce it:

“We could have come here, put the testimony of the doctor in that there was nothing wrong with him on April 30, 1951, and we wouldn't have had a true picture.” (Statement of appellants' counsel to the Court, TR p. 112.)

It is the theory of appellants' case, a person though admittedly affectionate with all members of his family, does violence to the propensities of human nature by leaving the proceeds of one insurance policy to his widow rather than his sister and brother. Appellants further contend an inference of mental incompetency can be drawn from this so-called unnatural act, coupled with evidence of (a) epilepsy and (b) some erratic behavior many, many months before the execution of a questioned document. We submit such an inference could be drawn only by resort to sheer conjecture and speculation.

ANSWER TO CLAIMS OF ERROR.

1. **THE DISTRICT COURT DID NOT ERR IN DELETING THE WORD "SUICIDE" FROM THE DEATH CERTIFICATE OF THE DECEASED VETERAN.** (Appellants' Exhibit "O-1".)

On March 16, 1952, 12 $\frac{1}{2}$ months after he executed the subject designation of beneficiary, the veteran died. According to the certified copy of death certificate (appellants' Exhibit "O-1") the disease or condition directly leading to the death was "bronchopneumonia. Antecedent causes due to barbituate poisoning." (TR p. 69.) This certificate contains a blank space labeled "29a" which calls for the following information: "Specify, accident, suicide or homicide:" In this space on the subject certificate some person had typed in the word "Suicide." Appellees objected to the introduction of this death certificate on the basis it did not conform to the statute [Health and Safety Code 10427] because the term "probable" did not precede the conclusion of "suicide."

California Health and Safety Code Sec. 10551, before its repeal by the legislature in 1957, provided:

"Evidentiary effect of photostatic or certified copies. Any photostatic copy of the record of a birth, death or marriage, or a copy, properly certified by the state or local registrar, or county recorder to have been registered within a period of one year from the date of the event is prima facie evidence in all courts and places of the facts stated in it."

Sec. 10427 of the same code also repealed by the legislature in 1957, provides:

"Death certificate: Prerequisites to interment. [Statements as to disease or external cause of

death] The coroner or other proper officer whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall:

(a) State in his certificate the name of the disease causing death, or if from external causes (1) the means of death; and (2) whether (probably) accidental, suicidal, or homicidal.

(b) Furnish such information as may be required by the State Registrar in order properly to classify the death.

[Issuance of certificate and permit authorizes interment.] Upon the issuance of the death certificate and burial permit the cemetery authority may proceed with the interment.”

The California District Court of Appeal, 4th District, has squarely ruled on the issue presented in this appeal involving the death certificate. In *People v. Proctor*, 108 C.A. 2d 739, 239 P. 2d 454, the term “probably” was also omitted from the conclusion or opinion as to the cause of death. There the Court held the objection to the introduction of the certificate should have been sustained, because the term “probably” was omitted. The Court held:

“The statutory requirement that a death certificate must include the word ‘probably’ before the words ‘accidental,’ ‘suicidal’ or ‘homicidal’ clearly indicates the intent of the Legislature that only an opinion or conclusion as to whether or not a death is homicidal should be stated. We conclude, therefore, that the objection to the introduction of the certificate in evidence to show that the

death was 'homicidal' should have been sustained."

Being inadmissible in the State Court the certificate was likewise inadmissible in the District Court (*United States v. Johnson*, 8th Cir. 72 F. 2d 614, 616).

2. THE DISTRICT COURT DID NOT ERR IN SUSTAINING OBJECTIONS TO THE ADMISSIBILITY OF THE LETTERS AND WRITINGS OF THE DECEASED VETERAN. (Exhibits U, AB, AC, AD, AE, AG, AH and AI.)

These writings were offered to prove that the deceased veteran had a family which he loved, and he exhibited an intent to make a will. (TR pp. 80, 81 and 82.)

Appellants failed to offer authority that a contract of insurance is a will. No issue was raised by the pleadings concerning love or affection for his family. Appellants agreed in open court the veteran loved his family. (TR p. 98.)

It is not questioned decedent was competent to enter into the marriage contract with appellee Frances Gardner. Regardless of gratuitous so-called trust contention, appellants have no claim equal or superior to appellees.

In addition, these writings were incompetent hearsay, and therefore inadmissible.

In *Hawkey v. United States*, 108 F. Supp. 941, a claimant to the proceeds of a National Service Life Insurance Policy attempted to introduce letters written by the veteran to her in support of her claim. The

Court held: "These letters are purely hearsay and were not admissible in evidence."

3. THE COURT DID NOT ERR IN SUSTAINING OBJECTIONS TO THE TESTIMONY OF THE VARIOUS WITNESSES CONCERNING THE RELATIONSHIP OF THE VETERAN WITH HIS FAMILY INCLUDING HIS WIDOW.

The purpose of this testimony was to show the veteran had a family (TR pp. 78 and 81), which was not in dispute (TR p. 81); that he loved his family, which was agreed (TR p. 98); that he had two children—this was stipulated (TR p. 73); that he had a mother, he had a father, he had a wife, and he had two children, and then, he had no wife, then he had a wife; he had a brother and a sister, the appellants; none of which issues were in dispute or otherwise involved. (TR p. 81.) None of these matters had any bearing upon the issue of the veteran's mental capacity to execute the designation of beneficiary on April 30, 1951.

Appellants charge that the District Court unduly restricted them in their scope of inquiry concerning the mental capacity of the veteran, is patently unfair. The Court showed great patience and allowed appellants wide latitude in this regard. They were allowed to read selected excerpts from medical records covering the period 1942 to the end of 1950 (TR pp. 25 and 66), yet they would have omitted, except for the insistence of appellees, reading to the Court and jury the final diagnosis upon discharge of the veteran in December 1950. It ill becomes appellants to criti-

cize the Trial Court when they have purposely tried to omit evidence which would have most likely assisted the Court and jury in determining the competency of this veteran: "*Competent*:" (TR p. 65.)

4. THE DISTRICT COURT DID NOT ERR IN SUSTAINING THE MOTION FOR DIRECTED VERDICT.

Considering the evidence the light most favorable to appellants, and drawing in their favor every legitimate inference, no fair minded person could infer that this veteran was mentally incompetent or that he was the subject of undue influence on April 30, 1951.

Appellants in the Trial Court, and in this Court, rely upon *Taylor v. United States*, 113 F. Supp. 143. It is from this case they draw their language of "mental delusion". In that case, however, there was ample evidence of mental delusion. There was evidence that for no reason at all the veteran had concluded marital discord existed between him and his wife. He charged her parents with antipathy towards the Navy; he met his death while making an unprovoked attack on his wife who had been a faithful and loving spouse.

It was shown the veteran was suffering from a mental disease known as dementia praecox, and that he was laboring under the insane delusion of marital discord at the very time he executed the designation of beneficiary. In the case at bar there is no evidence of any sort of delusion or discord between the veteran and members of his family; to the contrary, it was

shown and stipulated that he had nothing but love for them. Appellants would, however, label as an insane delusion the leaving of the veteran's life insurance to his spouse. Such argument is frivolous.

In *Taylor v. United States*, supra, it is held the burden of proof is upon appellants to establish by a preponderance of the evidence, that at the time the document was executed the decedent lacked testamentary capacity.

ARGUMENT.

The controlling section of the National Service Life Insurance Act provides that the insured shall have the right to designate the beneficiary of the insurance and shall at all times have the right to change the beneficiary. (38 U.S.C.A. Section 802g.)

No Court or state law can deny the insured in a National Service Life Insurance policy the right to change the beneficiary of it or designate some other person than the designated beneficiary to receive the proceeds thereof. (*Wissner v. Wissner*, 1950, 338 U.S. 665, 70 S. Ct. 398, 94 L. Ed. 424; *Heifner v. Soderstrom*, 134 F. Supp. 174).

Appellants' attempt to expand this litigation into the collateral issues presented by their theory of "constructive trust" of the proceeds of the policy, has previously been rejected in this circuit. (*Pack v. United States*, 9th Cir., 176 F. 2d 770, *Tohulka v. United States*, 7th Circuit, 204 F. 2d 414.)

Appellants assert at p. 20 of their brief:

“The test, however, is not whether Gardner was mentally incompetent on April 30, 1951”.

The law is otherwise. The test is whether Gardner was mentally incompetent on April 30, 1951, and the burden of proof is upon appellants to establish by a preponderance of the evidence that on that date the decedent lacked testamentary capacity. (*Taylor v. United States*, supra.)

To overcome the presumption of sanity, appellants must show by a preponderance of the evidence, the claimed incompetent was of unsound mind at the time he executed the designation of beneficiary. (*Estate of Smith*, 200 Cal. 152, 158, 252 P. 325; *Estate of Lingenfelter*, 38 Cal. 2d 571, 241 P. 2d 990.)

The evidence offered and produced by appellants on the issue of the veteran's incompetency near the date in question, was that concerning some irrational conduct several months before he executed the subject designation of beneficiary. According to the veteran's own statement on admission to the hospital, the reason for his conduct was “I have epilepsy and happened to get off my medication, and combined with drinking I had a period of confused behaviour.” (TR p. 54.) After hospitalization and treatment following this period the veteran was discharged as “competent”. (TR p. 65.)

It has been repeatedly held that before evidence may be left to the jury: “There is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which

a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. The rule is settled for the Federal Courts that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct a jury to find according to the views of the Court." *Pennsylvania R. Co. v. Chamberlain*, 1933, 288 U.S. 333, 343, 53 S. Ct. 391, 395, 77 L. Ed. 819; and *Wardman v. Washington Loan & Trust Co.*, 1937, 67 App. D.C. 184, 186, 90 F. 2d 429, 431.

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury." *Gunning v. Cooley*, 1930, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720, quoted in *Deere v. Southern Pacific Co.*, 9 Cir. 1941, 123 F. 2d 438, 440, certiorari denied 1942, 315 U.S. 819, 62 S. Ct. 916, 86 L. Ed. 1217; *De Zon v. American President Lines*, 9 Cir. 1942, 129 F. 2d 404, certiorari granted 1942, 317 U.S. 617, 63 S. Ct. 160, 87 L. Ed. 501, affirmed 1943, 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065, rehearing denied 319 U.S. 780, 63 S. Ct. 1025, 87 L. Ed. 1725. There must be substantial evidence offered by plaintiff to justify submission of the case to the jury. *United States v. Holland*, 9 Cir., 1940, 111 F. 2d 949; *Galloway v. United States*, 9 Cir., 1942, 130 F. 2d 467, certiorari granted 1943, 317 U.S. 622, 63 S. Ct. 437, 87 L. Ed. 504, affirmed 1943, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458, rehearing denied 1943, 320 U.S. 214, 63 S. Ct. 1443, 87 L. Ed. 1851; *Carew v. R.K.O. Radio Pictures*, D.C.S.D. Cal. 1942, 43 F. Supp. 199.

The absence of evidence that William E. Gardner, Jr., was mentally incompetent or acting under undue influence on April 30, 1951, gave the Trial Court no other choice except to grant appellants' motion for directed verdict.

CONCLUSION.

For the reasons stated, this Honorable Court should sustain the judgment entered herein.

Dated, San Francisco, California,
May 13, 1958.

Respectfully submitted,

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No. 15,789
United States Court of Appeals
For the Ninth Circuit

HELEN MAY GARDNER GLASER and
GEORGE R. GARDNER,

Appellants,

vs.

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as Frances Shenk Hester Gardner
and WILLANE HESTER HAYNES,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

I.

CONTESTED ISSUES.

There are two issues involved in this appeal. Briefly, these are: (1) the admissibility of the evidence and testimony offered by the Appellants and excluded by the District Court, and (2) the correctness of the District Court's ruling sustaining Appellees' motion for a directed verdict. Appellees seek to meet these issues "head on" but we believe they have not effectively challenged either the reasoning or the authority contained in Appellants' principal brief.

II.

THE DISTRICT COURT ERRED IN RESTRICTING THE DEATH CERTIFICATE (EXHIBIT O-1) BY COVERING THE WORD "SUICIDE".

In support of the District Court's ruling excluding the word "suicide" from the death certificate (Exhibit O-1), Appellees cite *People v. Proctor*, 108 Cal. App. (2d) 739, 239 Pac. (2d) 454. This case is not controlling and is distinguishable. In *Proctor*, a death certificate containing the word "homicide" was offered to establish probable cause on a preliminary hearing for murder and upon which an order of commitment was to be issued. The Court held that the inclusion of the word "homicide" was intended as an opinion only and as such could not be considered as a "fact" which would establish a *prima facie* case of homicide. Since this was a criminal proceeding, strict compliance with the rule would be required. In a civil proceeding, the rule is to the contrary. In the *Estate of Lenci*, 106 Cal. App. 171, 288 Pac. 841, a death certificate was admitted in evidence where the issue involved mental competency. It was contended that this was an error because the certificate was not in proper form. The Court stated (page 175):

"... A death certificate from the bureau of vital statistics, when properly certified, is *prima facie* evidence in all courts of the evidence therein stated. (Sec. 15 of an act approved March 18, 1905, as amended in 1911, Stats. 1911, p. 287.) If the death certificate is not in proper form it should not be used as authority for burial, cremation or disinterment purposes, but this would not

interfere with its introduction into evidence as *prima facie* proof of its contents.”

In the case of *Bryson v. Manhart*, 11 Cal. App. (2d) 691, 54 Pac. (2d) 778, a death certificate was admitted to establish the cause of death in a case involving a transfer of property in fraud of creditors. The death certificate recited “Gun shot wound of brain, suicidal.” At page 696, the Court stated:

“The findings are silent on the question whether decedent died by his own hand and defendants now contend that it was not established that decedent took his own life. Many circumstances were shown in evidence indicating suicide. A certificate from the registrar of vital statistics was presented certifying to the coroner’s certificate of death in which the cause of death is given as follows: ‘Gun shot wound of brain, suicidal.’ The certificate was evidence of the facts therein stated. (Stats. 1915, p. 575; *Estate of Lenci*, 106 Cal. App. 171 [288 Pac. 841]; *Robinson v. Western States Gas & Elec. Co.*, 184 Cal. 401 [194 Pac. 39].) No contrary showing was made.”

Compare, also:

Estate of Wolleb, 56 Cal. App. (2d) 488, 132 Pac. (2d) 864.

Whether a death certificate is admissible in evidence depends upon the facts in each case and the purpose for which it is sought to be introduced. It depends, also, upon whether it is an official record. Official records are an exception to the “hearsay” rule because it is assumed that these records are made

under the sanction of an oath of office. This distinguishes *Cropper v. Titanium Pigment Company*, (C.C.A. 8th Cir. 1931), 47 Fed. (2d) 1038, and the other cases cited under point 6(a) in Appellants' principal brief, and the case of *United States v. Johnson*, 8th Cir., 72 Fed. (2d) 614. In *Johnson* the basis of the ruling excluding the death certificate was the fact that it was not an official record but a record incidentally lodged with an official agency.

III.

THE DISTRICT COURT UNDULY RESTRICTED THE ADMISSIBILITY OF EVIDENCE CONCERNING THE NATURALNESS OF THE DISPOSITIVE ACT.

Appellants contend that the trial Court unduly restricted the evidence concerning the attitude of the deceased veteran towards his children. Appellees attempt to meet this argument by claiming (1) that they admitted the deceased veteran's love for his family, and (2) that the letters were hearsay.

With respect to Appellees' first contention, it is sufficient to say that such an admission could not present the true picture between the deceased veteran and his family. The naturalness of the disposition of property is not determined by the single factor that the one disposing of the property may love another but by many diverse factors. In *Taylor v. United States* (1953), 113 Fed. Supp. 143, the contest was between a wife and father. In *Metropolitan Life In-*

surance Company v. Anderson (1951), 101 Fed. Supp. 808, the contest was between a wife and a mother. If the evidence were limited to the admission that the veterans in those cases loved their respective spouses or parents, it is doubtful if the issue of incompetency could be resolved.

Much more is required to determine the naturalness of a dispositive act. The actions of the persons, the kind of lives they lead, the closeness with which a relationship is maintained, the concern for the welfare of the person, and many other similar factors are necessary for the proper determination of this issue. To say as the trial Court did:

“It is agreed he had a mother, he had a father, he had one wife, and he had two children and then he had no wife, and then he had a wife . . .”

is a summary disposition of the matter.

The second contention that these letters are hearsay is not sustained by authority. In *Hawkey v. United States*, 108 Fed. Supp. 941, the issue was whether the person to whom the letters were written stood in *loco parentis* to the deceased veteran. On this issue letters showing affection or otherwise are clearly hearsay. But the letters which a person writes to indicate his concern for the welfare of his children or acknowledges an intention to take care of them, and the manner in which he plans this intention to be carried out are admissible. This is clearly established by the case of *Littlefield v. Littlefield* (C.A. 10th Cir. 1952), 194 Fed. (2d) 695, cited in Appellees' principal brief.

IV.

THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT THE VETERAN WAS INCOMPETENT AS OF THE DATE OF DISPOSITIVE ACT DOES NOT CONSTITUTE A LIMITATION ON THE ADMISSIBILITY OF EVIDENCE OF CONDUCT PRIOR TO THE DATE OF SUCH ACT.

Appellees “peg” their argument that the trial Court properly sustained the motion for a directed verdict on two abstract principles of law which, though correct, lend no weight to their argument nor force to their reasoning. Mental incompetency is a question of fact to be determined by the Court or jury. To guide them in making a determination of this fact, evidence is required. The extent to which such evidence is admissible is not dependent upon the principle that a person challenging the validity of a document on the ground of mental incompetency must establish such incompetency as of the date of the challenged document. The quotation from Appellants’ principal brief (set forth in page 11 of the Appellees’ brief) that “the test, however, is not whether Gardner was mentally incompetent on April 30, 1951” is taken out of context. It is true that this was the ultimate issue to be decided, but as we set forth in our principal brief, the issue on this appeal is whether the evidence is of such a nature and of such sufficiency as would enable a jury to draw an inference of mental incompetency as of that date, and had the issue been submitted to the jury, and had the jury so found, there would then be presented a question of whether the evidence supported such a finding. As was said in the case of *Estate of Lenci*, 106 Cal. App. 171 at page 177:

“Unsoundness of mind cannot always be proved by one statement, one circumstance or by one witness, but often rests upon seemingly slight but numerous circumstances, which when ‘taken together, carry conviction of mental unsoundness.’ (28 R. C. L. 98, and cases cited.) Incompetency need not be proved by direct evidence, but acts, conduct, statements, both before and after, may be the determining factor *though no evidence be introduced of the exact condition of the testator’s mind upon the day of the making of a will.* (Estate of Johnson, 72 Cal. App. 670, [237 Pac. 816].) . . .” (Italics supplied.)

The evidence admitted, together with the evidence and testimony erroneously excluded, was sufficient to require the issue of mental competency to be resolved by the jury. Appellants in their principal brief have analyzed the evidence. They have shown that the deceased veteran was greatly concerned about the welfare of his children. They have shown the relationship between the deceased veteran and his family; that it was a normal relationship between parent and children; they have shown that the Appellee, Frances Shenk Hester, as of the date of the purported change of beneficiary, was not the wife of the deceased veteran; that there was no obligation of support; that the relationship was tenuous, even psychotic, and that if there was a degree of intimacy, it was predicated upon an illicit relationship. It is interesting to note that when the proposed change in beneficiary was executed, the secondary beneficiary named was the daughter of Mrs. Hester, a person apparently as old

as the deceased veteran, one with whom there was no relationship and to whom, upon any analysis of record, there was a complete absence of motivation which would cause the deceased veteran to provide for her. Here again, Appellees cite many cases in support of an abstract principal of law that "a mere scintilla of evidence is not enough to require the submission of an issue to the jury". The question before us in this case is whether the evidence offered and admitted presented more than a scintilla of evidence. We respectfully contend that it does.

CONCLUSION.

For the reasons stated, Appellants respectfully contend that the judgment should be reversed and remanded to the District Court with directions to grant Appellants a new trial.

Dated, Sacramento, California,
May 29, 1958.

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